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Master's Thesis of Law

Comparison of “Comfort Women”

Issues in Korea and Indonesia:

Missing Link between Diplomatic Protection and Human Rights

한국과 인도네시아의 위안부 문제 비교 연구:
외교적 보호권과 인권 간 연계 부재를 중심으로

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Comparison of “Comfort Women”

Issues in Korea and Indonesia:

Missing Link between Diplomatic Protection and Human Rights

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Abstract

Comparison of “Comfort Women” Issues in Korea and Indonesia: Missing Link between Diplomatic Protection and Human Rights

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The Republic of Korea and the Republic of Indonesia share common history in having been former Japanese colonies during the period of the Second World War. At that time, women from both countries were made victims of wartime sexual violence in alleged violations of human rights. The victims are recognized as the “comfort women.” The issue has since then grown into a legal debate between Japan and the national states of the victims pertaining to whether or not Japan was legally responsible for those crimes and whether the terms of the peace treaty between the states at the end of the war conclusively settled the matters.

Some scholars have argued that the government omission of not exercising diplomatic protection on behalf of the victims constitutes violation of the women’s fundamental rights, while others contend that the government has no legal duty to do so. The research will focus on this legal problem through a comparative study of comfort women diplomatic protection in Korea and Indonesia and analysing whether the classical principle of diplomatic protection can be a mandatory norm in the case of human rights and *jus cogens* violations. Based on the aforementioned analysis, this piece of work would proceed to discuss whether the new developed norm could be applied to the case of Korean and Indonesian comfort women.

The current prevailing view is that diplomatic protection is solely a discretionary right of a state and there is no obligation in international law to provide such protection. However, emerging state practices through three stages: provision of the right to diplomatic protection to individual or as a compulsory obligation through the national law, invocation of the right to diplomatic protection through constitutional or administrative track and judicial review of the discretion pertaining to diplomatic protection by competent judicial body, play a significant role in providing the missing link between diplomatic protection and international human rights. This is due to the ability of those domestic mechanisms to control the executive discretion and dilute the state-centric nature of diplomatic protection. As a result, diplomatic protection could be utilized effectively to enforce individual rights that have been violated and secure the reparations. This was known as the progressive practices of international law which are embodied in Article 19 of Draft Articles on Diplomatic Protection and its commentaries, adopted by the International Law Commission in 2006.

The states of nationality of the former comfort women are recommended to implement the progressive practices to solve the case, in order to ensure due process in enforcing the victims' human rights. It will also open a bigger opportunity for the victims to receive the appropriate reparation under international law. Furthermore, the compliance to the progressive practice will help to achieve the goal of contemporary international law, namely the advancement of individual human rights.

keywords : comfort women, diplomatic protection, human rights, state responsibility

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Introduction

The case of comfort women exploited by the Japanese military is a critical and currently unresolved international human rights issue. The issue has since then grown into a point of intense debate and political friction between Japan and the national states of the victims. There are two key elements to this issue. The first is to settle whether or not Japan was legally responsible for those crimes and the second asks if the terms of the peace treaty at the end of the war conclusively settled the matters regarding the practice of comfort women.

Two of major elements constituting the crime against comfort women, such as sexual slavery and racial discrimination, are undeniable violations of the *jus cogens* norms. The crime was systematic and widespread all over Asia, particularly within Japanese colonial territories. However, Japan has never been held liable for these crimes in any domestic and international courts.

The reluctance of the victims' national states to exercise diplomatic protection in order to invoke Japan's legal responsibility and secure proper reparations further, exacerbated the problems. Survivors and family of the deceased victims all over Asia have been seen trying to exhaust possible local remedies in Japanese courts. When these efforts ultimately failed, they tried to demand diplomatic protection by sending petitions to the ministry of foreign affairs in their respective states, even suing their government in domestic courts on the grounds that the omission of not performing diplomatic protection violated their rights to seek remedies under international law. For instance, former comfort women in the Republic of Korea filed a constitutional complaint against their own government in 2011. Philippines' survivors sued their government before the supreme court in 2010 and most recently, former Chinese comfort women petitioned the Ministry of Foreign Affairs of the People's Republic of China in 2017. Some of their requests were met with a granting of diplomatic protection, but most were ignored as government prioritized hospitable diplomatic relations with Japan over the rights of these women. Through not supported by data,

there is also little doubt that the dominance of gender biased male elites occupying the majority seats in foreign affairs might also have been influential in those decisions.

Koreans occupied the largest percentage among comfort women victims, which explains why their activism has been the most prominent. The effort to seek justice was initiated in 1991 when the first testimony of former comfort woman Kim Hak Sun was published. Subsequently, the government of the Republic of Korea took a stand in 1992 through the United Nations forum to demand that the Japanese government investigate the crime against the comfort women. Independent activism in Korea was also massive as it is mainly guarded by a coalition of women groups embodied in the Korean Council for the Women Drafted for Military Sexual Slavery by Japan which was established in 1990.

In contrast to the comfort women activism in the Republic of Korea, the voice of women in Indonesia has remained largely unheard, even in the international forum such as the United Nations. Not a single memorial to remember the comfort women has been erected inside the country. Their stories maybe made well-known overseas to gain the sympathy from international society, even among Japanese mass media,¹ but have not received due attention in Indonesia itself. Moreover, Indonesian law scholars have yet to amass proper legal research pertaining to the comfort women. This is perhaps due to the relatively lower number of Indonesian women who revealed themselves as victims, the lower number activists, limited databases and access to invoke diplomatic protection.

The research herein will reveal in greater detail the legal problems faced by Indonesian comfort women. It will focus mainly on comparing the situation of former comfort women in the Republic of Korea and Indonesia, beginning with the early emergence of activism up to the current status of having achieve the desired

¹ Keiji Hirano, "Photo Exhibition Shows Pain of Indonesian Former Comfort Women," *Japan Times* online, last modified October 19, 2015, <https://www.japantimes.co.jp/culture/2015/10/19/arts/photo-exhibition-shows-pain-indonesian-former-comfort-women/#.XLXZ4-gzbIU>.

diplomatic protection. The differing cases of comfort women in the two states will be used to show how diplomatic protection can be employed as a tool to enforce the rights of victims who have suffered from gross violations of human rights and violations of *jus cogens* norms, once the current prevailing state-centric characteristic of diplomatic protection is set aside and replaced by a more individual-centric approach.

Throughout this thesis, terms such as “comfort women”, “survivors” and/or “victims” will be used interchangeably to address the women who were victimized by Japanese military-enforced prostitution during World War II. In Korea, the term ‘*jeonggun wianbu*’ is widely used to describe the women, whereas in Indonesia the Japanese term ‘*jugun ianfu*’ is more prevalent. The term ‘comfort women’ is widely contested because it gives the impression that the victims voluntarily entered into the servitude, rather than depicting the actual experience of forced sexual slavery or rape. Yet regardless of the opposition, the term remains in popular use. Therefore, it will be used frequently in this thesis.

Also, in addressing the states to whom the comfort women are nationals, terms such as “states of nationality” or “national states” will be used interchangeably. The usage of the former is based on Article 3 Paragraph (1) of Draft Articles on Diplomatic Protection 2006 which defines, “The State entitled to exercise diplomatic protection is the State of nationality.” Whereas, the latter is a term which can be seen frequently in the commentary of the draft articles and some ICJ cases on diplomatic protection, namely the *Barcelona Traction* and the *LaGrand*.

Chapter 1. Theoretical Framework

1.1.Scope of Research

This thesis will only include the situation of comfort women in the Republic of Korea (hereafter Korea or the Republic of Korea) and will not include the Democratic People's Republic of Korea as the object of research. Regarding the victims of the comfort women system in the Republic of Indonesia (hereafter Indonesia), this research will only include victims who held Indonesian nationality after the country gained independence. I am aware that Dutch women also became the victims of the practice within the period of transition from Dutch colonial to the Japanese colonial government. However, they will not be included in this research because Dutch victims are no longer associated with Indonesia and the main focus of the research is to highlight the Indonesian victims as the object of comparison.

1.2.Time Period of Research

This research will focus on historical facts surrounding the comfort women system during the Second World War (1939-1945). The research covers a longer period for Korea, from 1939 to 1945 and a shorter period for Indonesia, from 1942 to 1945. Time discrepancies exist because Japan colonised Korea for a longer period than Indonesia. After the liberation of the two states, the timeline will hop to international tribunals held to adjudicate Japan's crimes in World War II. These tribunals span the Tokyo Trial in 1946 to the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery in 2000. The peace treaties conclusion process between Japan and Korea in 1965, as well as between Japan and Indonesia in 1958 will also be highlighted.

The time flow will continue to the period when former comfort women in the two countries expanded their advocacy until they obtained diplomatic protection from their respective governments. In the case of the Republic of Korea, the timeline will span from the Korean comfort women activism that started in 1991, through the

Korean constitutional court decision in 2011 to the comfort women bilateral agreement between Japan and Korea signed in 2015. The debate on the legality and validity of that agreement has continued in both national and international forums from the beginning of 2016 until now. Regarding comfort women activism in Indonesia, the timeline of facts will start from 1992, when Indonesian and Japanese lawyers investigated the case. Subsequently, it will lead to the involvement of the Asian Women's Fund (AWF) from 1997 to 2003 in the project, claimed by the Japanese government, as a form of redress for Indonesian comfort women.

1.3.Methodology

The research will focus on legal problems in the field of international law, particularly those related to diplomatic protection and international human rights. In every legal research study, sources of law are utilized to analyse legal facts. Generally, there are two types of law sources, primary sources, and secondary sources.

Primary sources contain the law itself and are mandatory in legal research.² The primary sources used in this research are divided into two types, covering international and national scope:

1. Sources of international law

As the research is thoroughly focused on international law, the sources of law stipulated in Article 38 (1) of Statute of the International Court of Justice such as the followings will be utilized as tools to analyse the legal facts.

- a. International conventions, whether general or particular, establishing rules expressly recognized by states

Conventions in the scope of international human rights and humanitarian law will be used to point out the Japanese government's legal responsibility in the case of comfort women system, particularly conventions concerning

² Carol M. Bast and Margie Hawkins, *Foundations of Legal Research and Writing* (Australia: Delmar Cengage Learning, 2010), 13.

trafficking in women in the 1910s and 1920s, as well as the 1907 Hague Convention on Land Warfare and Its Regulation to which Japan is a party. The explanation of these conventions will be brief since their function is only to confirm the existence of legal responsibility.

b. Customary international law

The topics in this research study will be dominated by customary international law. The comfort women issue involves the issue of state responsibility and diplomatic protection that have not been codified in any treaty yet. The norms are customary international law which evolves from state practices. International lawyers are certain of the binding force of the norms, thus the United Nations International Law Commission (ILC) successfully produced the Draft Articles on Responsibility of States for Internationally Wrongful Acts in 2001, as well as Draft Articles on Diplomatic Protection in 2006. Those draft articles will become the fundamental platform for the study. Besides, the norms of customary international law that have been crystallized in a treaty, such as the 1926 Slavery Convention, will also be consulted to determine the legal responsibility of Japan regardless of the fact that Japan is not a party to the convention.

c. The general principles of law recognized by civilized nations

The most salient law principle to be highlighted by this research is the principle of legal fiction, particularly when it is applied to diplomatic protection.

d. Judicial decisions

The judgments of international and regional courts in the field of diplomatic protection involving violation of human rights will be used as mediums of reflection to measure whether the current advancement of state practices and *opinio juris* are sufficient to form a solid basis for customary international law.

2. Soft law

Soft laws are law instruments that are not binding like treaties but have a purpose to promote norms which are believed to be good, and therefore have to be applied universally. The traditional list of international law sources provided by the ICJ statute does not identify soft law. However, it is undeniable that following current developments in international law, international actors frequently accept soft law as norms regulating the relationships among such actors since their non-legally binding characteristic results in lower sovereignty costs. Consequently, consent to be bound by the rules can be achieved more quickly and easily.³

a. United Nations General Assembly Resolutions

The ICJ in its Nuclear Weapons advisory opinion stated that General Assembly Resolutions, even if they are non-binding in nature, may sometimes have normative value. The resolutions can provide important evidence for establishing the existence of a rule or the emerging *opinion juris*.⁴

b. Recommendations of human rights treaty bodies

Due to the complexity of the case of the comfort women which involved violations of various kinds of human rights, the problem came to the attention of multiple human rights treaty bodies such as, the Human Rights Committee under ICCPR, the Committee on the Elimination of Racial Discrimination (CERD Committee), the Committee on the Elimination of Discrimination against Women (CEDAW Committee) and the Committee against Torture (CAT Committee). However, since the comfort women issue is composed primarily of women's rights violations, only recommendations from the Committee on the Elimination of Discrimination against Women (hereinafter CEDAW Committee) will be used for analysis. The recommendations play a role as soft laws that emphasize the condemnation of the sexual slavery of comfort women as *jus cogens* norm.

³ Sean D. Murphy, *Principles of International Law* (St.Paul: Thomson Reuters, 2012), 111.

⁴ Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, I.C.J. (July 8, 1996), at 226, 254-255, para 70.

3. Sources of national law

Since this study includes a comparison of how two states handled comfort women issue, regulations at the domestic level have to be investigated to assess the implementation and integration of international law norms in the states' national law systems respectively.

a. Constitutions

The Constitutions of the Republic Korea (last amended on October 29, 1987) and the 1945 Constitution of the Republic of Indonesia (last amended in 2002) will be employed as tools to assess whether the fundamental rights of the comfort women are guaranteed and whether diplomatic protection is deemed to be a right protected by the constitution in the respective states.

b. Statutes

Statutes can be used to measure whether the states in question have made concerted efforts to guarantee the human rights of the former comfort women in the absence of official reparations from Japan.

c. Decisions by national courts

Recently there has been a tendency for the judicial branch of government to allow itself to review the discretion of the executive branch in the field of diplomatic protection when the case in questions involves violations of human rights. Thus, national courts' judicial decision, typically the constitutional court decisions, will be utilized to analyse whether these practices are robust enough to emerge as a new customary international law norm, considering the fact that they have not been regulated in the ILC draft articles yet. The decision of the Constitutional Court of Korea regarding the government omission in protecting former Korean comfort women is probably the most notable one in Asia.

Secondary sources are commentaries on the law, documents or research reports that confirm the existence of law and tools used to find primary sources.⁵ Secondary sources used to support this research consist of:

1. Reports of the special rapporteurs

Special rapporteurs are members of the ILC who are appointed by the organization to perform research on particular topics in international law, which become the study agenda of the ILC over a particular period. ILC has appointed one special rapporteur from its members for every new topic of study, mostly international law academicians and foreign ministry legal advisors. After the topic is decided, a special rapporteur is required to present his or her research report to the ILC. Alongside the report, he or she is also expected to submit proposals and draft articles for a possible treaty regarding the international law topic that is being studied.

The exposure of the comfort women issue cannot be separated from the efforts of several special rapporteurs, particularly Radhika Coomaraswamy from Sri Lanka and Gay J. McDougall from the United States. Coomaraswamy delivered her reports on the study of violence against women in 1996, 2001, and 2003. All of her written reports during those years cover the investigation of the comfort women issue in Korea and other countries. On the other hand, Mc Dougall's reports which exposed the comfort women issue were written in 1998 and 2000 on the main topics of systematic rape, sexual slavery and slavery-like practices during the armed conflict. Although there are still many comfort women-related reports from other special rapporteurs, this research will prominently use the reports of the two aforementioned experts as sources, since theirs presented the most comprehensive facts and analyses as discovered throughout the research period. Reports of the special rapporteur are perfect example of the writings of

⁵ Bast and Hawkins, *Foundations of Legal Research*, 13.

the most highly qualified publicists of the various nations stipulated in Article 38 (1) Section d of the Statute of the International Courts of Justice.

The reports of ILC special rapporteurs that are related to the development of diplomatic protection as customary international law norm will not be excluded from scrutiny. In particular, a brief look will be taken at reports written by the special rapporteur Mohamed Bennouna published in 1998, followed by a detailed investigation on John Dugard's reports published between 2000 and 2006.

2. Documents of Universal Periodic Review conducted by United Nations' human rights treaty bodies

Subsequent to the utilization of the CEDAW Committee recommendation, the documents submitted by state parties on which the recommendations are based will become the objects of observation. The documents consist of state parties' reports, shadow reports from non-governmental organizations (NGOs) and summaries of meetings. Since the objects of this research are the Republic of Korea, Indonesia, and Japan, the universal periodic review documents concerning those three states were observed. In particular, this research used the periodic review document of Japan in 2009 and 2016, as well as the Republic of Korea's which were issued in 2007 and 2018. Unfortunately, the comfort women issue could not be traced in Indonesian universal periodic documents at all. This finding will be explained further in the following chapters.

3. Other documents published by the International Law Commission

Other documents issued by the ILC analysed in this research comprise of treatises and commentaries of UN member meetings regarding deliberation process in formulating the Draft Articles on Diplomatic Protection 2006.

4. Books

Historical aspects of the comfort women issue could only be traced from the works of the academicians who specialized in the history of World War II. As it would constitute a herculean task to conduct direct fact findings by visiting the

victims and the involved government officials in terms of time, language barriers and availability, referring to the commonly used academic works on the comfort women issue is an oft-utilized alternative. Several infamous and frequently cited works written by historians, such as Yuki Tanaka and Yoshimi Yoshiaki will be used as references to explain the legal facts surrounding the reality of the comfort women system.

5. Law reviews and periodicals

This type of source will be used restrictively to explain the legal facts in the comfort women case, but it will be mostly utilized to elaborate recommended state practice in the field of diplomatic protection stipulated in Article 19 of the Draft Articles on Diplomatic Protection in 2006. Since this concept still constitutes a *lex ferenda*, works of literature that discussed the issue are still scarce. Thus, using law reviews and periodicals are the best options available.

This thesis falls under the category of comparative study. It will compare two countries, the Republic of Korea and the Republic of Indonesia, in terms of how they perform diplomatic protection on behalf of former Japanese military comfort women who are nationals of their respective countries. The process will determine which country has more effectively handled the issue based on two indicators, domestic measures of protection and conformity with recommended practices stipulated in the Draft Articles on Diplomatic Protection 2006. The result of the comparison will be used in a convergent manner to grasp whether there is a tendency for state practices and *opinio juris* to consider diplomatic protection as a compulsory duty for states in the case of serious human rights violations. Korean and Indonesian practices will be used to represent Asian practices in general and they will be further compared with the practices on other continents, such as Europe and Africa. The continental comparison will be used to seek out a commonality in the international legal order, namely whether diplomatic protection as a compulsory legal duty can be accepted worldwide as a new emerging customary international law, in line with the current

development envisaged in Draft Articles on Diplomatic Protection 2006. Last but not least, the following section of this thesis will be linked back to the result of the comparison between the Republic of Korea and Indonesia. Whichever country to this research has more practices in conformity with international human rights law, will be analysed further to suggest the practical revisions for the less conforming one.

The literature review of the sources mentioned above is the only tool that will be employed to collect qualitative data about the legal facts and development of state practices in respect to diplomatic protection regarding the comfort women issue. The analysis method employed is the IRAC approach that is commonly used in legal research. IRAC stands for Issue Rule Application and Conclusion.⁶ The first step in this research will be the process of laying out the main issue regarding comfort women as it pertains to diplomatic protection, followed by an elaboration on international law rules related to how diplomatic protection should be exercised. The next step will be examining the application, which is to compare and contrast the facts of the case and figure out whether the relevant international law rules have been applied appropriately in the issue. These steps will lead to the conclusions of this research.

1.4.Objectives of the Research

All of the aforementioned methods were employed to answer three legal inquiries. First, the research aims to assess which state, the Republic of Korea or Indonesia is more effective at exercising diplomatic protection on behalf of their nationals victimized by the comfort women system during World War II. After assessing the effectiveness of such measures, based on the theories of international law, I will analyse the legal rationale behind why one approach is more successful than the other.

⁶ Peter Jan Honigsberg, *Legal Research, Writing and Analysis* (Chicago: Thomson/West, 2006), 112-113.

Second, regardless of which is more effective in protecting its citizens in the case of comfort women, the reluctance of the government to exercise the right of diplomatic protection was shown hypothetically in the two countries. This reluctance hinders the states from performing their obligations under human rights law to protect the rights of their citizens. This reluctance is probably caused by a missing link between diplomatic protection, which is perceived solely as the right of the state currently, and international human rights law, which always emphasizes the protection of the right of individuals. Therefore, as the second objective of this research, I will try to find the said missing link and ways to restore it.

Third, after finding the missing link in the second objective, this research will seek out suggestions for a more effective diplomatic protection system in Indonesia and Korea. Furthermore, I will elaborate on how such suggestions could influence global practices in the field of diplomatic protection both in the Asian region and internationally.

Chapter 2. Overview of Comfort Women Issue

2.1. Comfort Women as an International Human Rights Issue

Comfort women system that was manifested in the establishment of comfort stations, was initiated by the Japanese military in the 1930s during World War II. The motivation of setting up the comfort stations was to mitigate the problem of rape against civilian women committed by the Japanese Central China Area Army in Nanjing when they started to invade China in a full scale.⁷ The leaders of the army started to instruct the commanders of each military contingent to set up the comfort stations in 1937 because they believed that this strategy could prevent future rapes.

Initially, there were some Japanese professional prostitutes employed in the comfort stations. However, the increasing number of Japanese military personnel soon outstripped the number of prostitutes. Thus, they started to hire local women who resided in the area where military bases were established.⁸ As Japan expanded its empire and gained new colonies, the military started to hire local women from other colonies' territory, such as other East Asians and Southeast Asians. It is impossible to know the exact number of women exploited as relevant documents were either hidden or destroyed at the end of the war. The prevailing estimates range from 80,000 to 100,000.⁹ Of these women, eighty per cent of them were Koreans. The rest were from Taiwan, China, the Philippines, Indonesia and Malaysia.¹⁰

The issue of the comfort women of the Japanese military came to light in the international community when the United Nations Commission on Human Rights (UNCHR) began a series of hearings in 1992. The hearings were triggered by a class

⁷ Ibid., 28.

⁸ Ibid., 13.

⁹ "Amerika Minshu-shugi no Shinzui", *Yomiuri Hochi*, September 23, 1945.

¹⁰ Tanaka, *Japan's Comfort Women*, 31.

action suit brought by a number of former Korean comfort women against the Japanese government in December of 1991.¹¹

The first critical statement about the comfort women issue was delivered to the Japanese government by a Japanese lawyer, Totsuka Etsuro, in February of 1992 at the UNCHR meeting. He spoke as a representative of East Asia for International Educational Development (IED), a non-governmental organization (NGO) based in Japan.¹² The statement was followed by a joint statement by IED and the Korean Council for Women Drafted for Military Sexual Slavery by Japan (hereafter Korean Council) in May of 1992. The two organisations raised the comfort women issue at the UNCHR Sub-Commission Working Group on Contemporary Forms of Slavery.¹³

The term “comfort women” is used as a euphemistic term for the issue, whereas the official name of the human right violation is either “military sexual slavery” or “enforced prostitution by the military”. Those official terms are found in numerous international human rights documents, resulting from an investigation conducted by international human rights lawyers subsequent to the revelation of the issue in 1992. The lawyers worked within the frame of UNCHR and current United Nations human rights treaty bodies. The documents are mostly not in the form of treaties or conventions because the particularity of the comfort women issue had not been regulated through contemporary human rights instruments when the case was brought to light.

The 1995 Preliminary Report on Violence against Women, Its Causes and Consequences by Special Rapporteur Radhika Coomaraswamy was the first international document which addressed the system of comfort women as “sexual

¹¹ Chunghee Sarah Soh, "Prostitutes versus Sex Slaves: The Politics of Representing the Comfort Women," in *Legacies of the Comfort Women of World War II*, ed. Margaret Stetz and Bonnie B.C. Oh (New York: Routledge, 2015), 69.

¹² Etsuro Totsuka, “Chonggun Wianbu, Kangje Yonhaeng Munje wa U.N.,” in *Congsindae Charyojip IV* (Seoul: Chongdaehyeop, 1993), 69-76.

¹³ Soh, “Prostitutes versus Sex Slaves,” 69.

slavery by the military”. The special rapporteur remarked that the comfort women system is a unique form of human right violations since it was created from two simultaneous elements, forced mobilization and sexual slavery. Japanese imperial forces were reported to practise systematic mobilisation of women of the occupied area by force, under pretence or kidnapping, in order to employ them in comfort stations.¹⁴

Coomaraswamy described the element of sexual slavery as multiple rapes on an everyday basis in the military comfort houses which were strictly regulated by the military and set up in such places where the military was stationed.¹⁵ The involvement of the Japanese government was depicted when the soldiers were recommended by their commanding officers to use the comfort stations in order to stabilize their psychological condition, revitalize their combat spirit and protecting them from venereal infections, as well as a measure to prevent looting and widespread rape during military operations in villages.¹⁶

The main focus of the 1995 Preliminary Report on Violence against Women, Its Causes and Consequences was to urge the Japanese government to provide compensation to the victims. She stated that the right to appropriate compensation is well recognized under international law, even though the precise losses cannot be clearly established. The perpetrator should keep in mind that the obligation to provide compensation as a means to provide restitution for international wrongful act is a well-established principle in international law.¹⁷

In her re-issued Report written in 1996, special rapporteur Radhika Coomaraswamy criticised the usage of the term “comfort women” by the Japanese

¹⁴ United Nations, Economic and Social Council, Commission on Human Rights, *Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences in accordance with Commission on Human Rights Resolution 1994/45* by Radhika Coomaraswamy, E/CN.4/1995/42 (1995), 68.

¹⁵ Ibid.

¹⁶ Paper prepared by the non-governmental organization Korean Women Drafted for Military Sexual Slavery by Japan, Seoul, August 1994, quoted in Coomaraswamy, *Preliminary report*, 68-69.

¹⁷ Ibid.

government because it does not reflect the suffering, which included multiple rapes on an everyday basis and physical abuse suffered by the women. That was the reason why the rapporteur did not use the term “comfort women”. Instead, she used “military sexual slaves” as a more accurate terminology.¹⁸

The aforementioned report was written based on the special rapporteur’s direct investigation in Korea and Japan. Thus, it provides more elaborate and comprehensive details than the 1995 preliminary report, especially since it broke down the elements of human rights violations in the comfort women system, which are nowadays prohibited in the contemporary human rights’ treaties. Besides the element of sexual slavery, the report also pointed out the element of forced mobilisation, arbitrary deprivation of freedom and deprivation of life.

The element of sexual slavery in the comfort women system was reiterated in the 1996 report by noting that sexual services were rendered by the women with inadequate to no payment at all. Only a few of the women received some income at the end of the war.¹⁹

The element of forced mobilisation is manifested by the fact that the comfort women, who were mostly Koreans, were forcibly transported to comfort stations in other regions where military operations were being conducted, such as China, Taiwan, Borneo, several Pacific Islands, Singapore, Burma and Indonesia. Many of them did not know where they were, even until the end of the war and some of them were simply abandoned at such sites without information on how to go back to their home countries.²⁰

Arbitrary deprivation of freedom is shown by the fact that comfort station sites were surrounded by barbed wire fences, guarded and patrolled. Movements of the

¹⁸ United Nations, Economic and Social Council, Commission on Human Rights, *Addendum of Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences: Report on the mission to the Democratic People’s Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime* by Radhika Coomaraswamy E/CN.4/1996/53/Add.1 (1996), 4.

¹⁹ Ibid., 10.

²⁰ Ibid., 7.

women were monitored and restricted. Many of them were not allowed to leave the sites. Escape was almost impossible due to the strict guard patrols by military officers.²¹

Arbitrary deprivation of life was manifested in the fact that some of the remaining comfort women were killed by the retreating Japanese troops at the end of the war. They killed the women because they felt that the women would be possible witnesses of their crimes, were they to be captured by the Allied Forces troops. Many women were also forced to participate in suicide missions with the Japanese soldiers.²²

It is thus concluded that the comfort women system was a complicated system which covers all possible violations of obligations stipulated in human right treaties, namely crime against humanity, slavery and forced prostitution. After collecting testimony from the victims, Coomaraswamy concluded that the victims demand the Japanese government to admit and recognise that the aforementioned violations and crimes were the true nature of the comfort women system, rather than a simple case of voluntary prostitution.²³ It is also important to note that Coomaraswamy's report also specifically provides some evidence of Japanese government involvement in the comfort women system. This evidence will be explained further in the following chapters.

Eventually, Coomaraswamy concluded the 1996 report by demanding the Japanese government, in national level:²⁴

- acknowledge that the system of comfort stations set up by the Japanese Imperial Army during the World War II was a violation of its obligations under international law and accept legal responsibility for that violation;
- pay compensation to individual victims;

²¹ Ibid., 10.

²² Ibid., 7.

²³ Ibid., 16-17.

²⁴ Ibid., 31-32.

- disclose the documents and materials in its possession with regard to the comfort women system;
- make a public apology and written apology to the individual victims;
- raise awareness of these issue by amending educational curricula for the purpose of reflecting historical realities;
- identify and punish perpetrators involved in the recruitment of comfort women and institutionalisation of comfort stations.

At the international level, the 1996 report provided three recommendations. First, it summoned all non-governmental organisations to raise these issues within the United Nations system. Second, it suggested the victims' national states to consider of requesting the International Court of Justice to help resolving the legal issues concerning Japanese responsibility and payment of compensation for the comfort women. Lastly, it urged the government of Japan to take into account and act according to the recommendation as soon as possible, considering the advanced age of the survivors.²⁵

The subsequent report dated August 12, 1998, submitted by Special Rapporteur Gay J. McDougall stated that although prohibition of gender-based violence, such as rape, is not considered as a *jus cogens norm*, prohibition of sexual slavery cannot be excluded since it contains the element of "slavery" which is certainly a part of *jus cogens*. The term "sexual" is used as an adjective to describe a form of slavery and does not refer to any other crimes. The comfort women system satisfied the definition of slavery in the sexual domain.²⁶ Thus, it is undeniably a violation of *jus cogens*, which is defined as the norm accepted and recognised by the international

²⁵Ibid.

²⁶United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report of the Special Rapporteur on Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict* by Gay J. McDougall (1998), E/CN.4/Sub.2/1998/13, 9.

community as a whole and as a norm from which no derogation is permitted.²⁷ Another reason to label the comfort women practice as the violation of *jus cogens* is that it exhibits a similarly egregious nature with other types of sexual slavery, such as systematic rape documented in the case of the former Yugoslavia.²⁸

McDougall adduced that the treatment of the comfort women falls within the most widely recognised definition of slavery as stipulated in the 1926 Slavery Convention. As understood from the convention, slavery is the status or condition of a person over whom any or all the powers attaching to the right of ownership are exercised.²⁹ The substantive law conforms with the fact that the comfort women's freedom was abrogated and they were recruited against their will. They had to move with military troops and equipment into and out of war zones and their sexual autonomy was denied, as they were subjected to restrictive regulations regarding their reproductive health for the purpose of protecting soldiers from venereal diseases.³⁰

The slave trade includes all acts involved in the capture, acquisition or disposal of a person with the intent to reduce him to slavery, acts of acquisition of slaves for the purpose of selling and exchanging slaves, and acts of disposal by sale or exchange of slave.³¹ In the comfort women practice, the 'recruitment' is similar to the activity of slave trading, as some of the women were 'purchased' in the exchange of money from their kidnappers, and sometimes even their parents or relatives.³²

The report further specified the type of sexual slavery into several categories, such as forced marriage, domestic servitude, rape by captors in armed conflict and

²⁷ Article 53 of "Vienna Convention on the Law of Treaties," entry into force January 27, 1980, *United Nations Treaty Series*, Vol. 1155, No. 18232 (1987): 331, https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01.pdf.

²⁸ McDougall, *Report on the Contemporary Forms of Slavery* 1998, 9.

²⁹ Article 1 (1) of "Slavery Convention," entry into force March 9, 1927, *League of Nations Treaty Series*, Vol. 60. No.1414 (1927): 254, https://treaties.un.org/doc/Treaties/1926/09/19260925%2003-12%20AM/Ch_XVIII_3p.pdf.

³⁰ McDougall, *Report on the Contemporary Forms of Slavery* 1998, 43-44.

³¹ Article 1 (2) of Slavery Convention Signed at Geneva on September 25, 1926.

³² McDougall, *Report on the Contemporary Forms of Slavery* 1998, 43-44.

forced prostitution. “Forced prostitution” or “enforced prostitution” is the term that McDougall chose as the most accurate nomenclature to address and describe the comfort women practice. It refers to the condition where a person is coerced by another to engage in sexual activity continuously to the point of harming one’s physical and mental health.

However, the definition of forced prostitution in international human rights and humanitarian conventions have been deemed insufficient to be applied. The conventions often described forced prostitution in vague terms as mere immoral attacks on a woman’s honour, but it seems that they forgot to address the element of slavery encompassed by the crime.³³ Indeed, it is easier to prosecute and prove that forced prostitution is slavery, rather than as crimes against honour. This is because the elements of crime in slavery are more concrete, whereas the elements of crimes against honour, as McDougall states, are vague. First, it is difficult to define and prove what women’s honour is. Second, it is vague in the sense that the phrase or term of “sexual slavery” or “violence” is not explicitly mentioned to define “enforced prostitution” in international criminal provisions, and thus fails to describe the gravity of the deed. This is probably due to the subordination of women in societies.³⁴ Moreover, without the element of slavery inserted in the definition, it would also be difficult to address and prosecute enforced prostitution as a violation of *jus cogens*.

In December of 2000, as the complementary of the special rapporteur’s reports, the Women’s International War Crimes Tribunal for the Trial of Japanese Military Sexual Slavery elaborately broke down several elements of slavery in the comfort women system. The elements are involuntary or forced recruitment, treatment of the women as commodities, deprivation of fundamental rights and basic liberties, non-

³³ Ibid., 10.

³⁴ Ibid.

existence of payment to compensate the sexual services and discrimination against women.

According to humanitarian law perspectives, comfort women practice can be categorized as a war crime as it happened during the armed conflict. The term war in the context of comfort women must be interpreted broadly. It does not only cover war between states but also war for national liberation, namely situations when nations fight against colonial domination to exercise their right of self-determination.³⁵ The same was applied to the time period of comfort women cases when Korea and Indonesia were fighting for liberation against Japan.

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (hereafter Geneva Convention 1949) has categorized women as protected persons by international humanitarian law.³⁶ Protected persons are those who at a given moment and in any manner whatsoever, find themselves in case of a conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals.³⁷ In the case of comfort women, they found themselves in the hands of Japan as the occupying power of the countries in which they were nationals during World War II. Thus, it may be surmised that international humanitarian law treaties and customary law functioned to protect these women from various violations in armed conflicts.

The Geneva Convention 1949 mentioned that protected persons shall be treated humanely at all the times and shall be protected especially against all acts of violence or threats, insult and public curiosity.³⁸ Specifically, Article 27 of the convention regulates special provision that women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form

³⁵ G.P.H. Haryomataran, *Hukum Humaniter [Humanitarian Law]* (Depok: Rajawali, 1984), 119-122.

³⁶ Article 27 of "Geneva Convention Relative to The Protection of Civilian Persons in Time of War of August 12, 1949," conclusion date August 12, 1949, *United Nations Treaty Series*, Vol. 75, No. 973 (1973): 288, <https://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-973-English.pdf>.

³⁷ Article 4 of Geneva Convention 1949.

³⁸ Article 27 of Geneva Convention 1949.

of indecent assault. Thus, it is obvious that comfort women practice, which by nature was enforced prostitution, is strictly prohibited by international humanitarian law. The rules which play the role to protect women by condemning forced prostitution were also stipulated in the 1907 Hague Convention. Forced prostitution was categorized by interpretation of war tribunals (Nuremberg Trial and Tokyo Trial 1945), as a crime against family's honour and rights.³⁹

The treaty law, as well as customary international humanitarian law, on the prohibition of enforced prostitution, became the basis to adjudicate Japan in front of the Tokyo Trial. However, the tribunal was merely tried the force prostitution against victims from Allied Forced nationals. Asian victims, such as Koreans and Indonesians, were not covered.

2.2.State Responsibility of Japan

Japan has denied for many years any direct involvement by its military in establishing and supervising comfort stations during World War II. Eventually, the Japanese government recognised its own involvement in the establishment of comfort stations in an official document entitled “On the Issue of War Time ‘Comfort Women’, issued on August 4, 1993 by the Japanese Cabinet Councillors’ Office on External Affairs and in the statement by Chief Cabinet Secretary Kono Yohei on the same date.⁴⁰

However, the statement was subsequently withdrawn and the Japanese government resumed its denial, particularly by responding to the report by Special Rapporteur of the Commission on Violence against women, Radhika

³⁹Article 46 of “1907 Hague Convention on Laws and Customs of War on Land,” *ICRC Online*, <https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6?OpenDocument>.

⁴⁰United Nations, Economic and Social Council, Commission on Human Rights, Unofficial Translation of Statement by the Chief Cabinet Secretary August 4, 1993 (Annex I of Note Verbale dated March 26, 1996 from the Permanent Mission of Japan to the United Nations Office at Geneva Addressed to the Centre for Human Rights), E/CN.4/1996/137 (1996), 10-11.

Coomaraswamy. The denial was based on a number of substantive grounds which include:⁴¹

1. that according to recent development, international criminal law may not be applied retroactively;
2. the crime of slavery does not accurately describe the system of comfort stations and that the prohibition against slavery was not established as a customary norm under any applicable international law in the period of World War II;
3. that acts of rape in armed conflict were not prohibited by the regulations annexed to the Hague Convention No. IV of 1907 or by applicable customary international law at the time of World War II;
4. that the law of war would apply in the conduct committed by Japanese military against nationals of a belligerent state, thus it would not cover the action of the Japanese military with respect to Japanese or Korean nationals since Korea was annexed to Japan during the World War II.

The Japanese government also denied the claims for legal compensation by arguing that individual comfort women do not have the rights to such compensation. The individual claims were supposed to be handled by peace treaties and international agreements between Japan and other Asian states following the end of World War II. Besides, the claims would be inadmissible because any civil or criminal cases concerning World War II would now be deemed expired by the applicable statute of limitations provisions.⁴²

Regardless of the denial of legal responsibility and denial of the victims' right for legal compensation, there was some written and unwritten evidence found that pointed out Japan's extensive involvement in the system. This section will briefly elaborate on some of the evidence found and analyse whether the Japanese government's conduct constitutes grounds for state responsibility based on the ILC

⁴¹ Coomaraswamy, *Report on Violence Against Women*, 1996, 24-30.

⁴² Ibid.

Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 (hereafter ILC Draft Articles 2001).⁴³

According to the ILC Draft Articles 2001, every internationally wrongful act of a state entails the international responsibility of that state.⁴⁴ The state responsibility could be invoked if it satisfies two elements. The first element requires that the action or omission is attributable to the state under international law, whereas the second element requires that the act or omission constitutes a breach of an international obligation of the state.⁴⁵ Draft Articles 2001 stipulates several types of attribution of conduct to a state. In particular, the acts and omissions conducted by Japan can be categorised in at least two types of attribution specified in Draft Article 4 and 8.

Draft Article 4 (1) states, “The conduct of any State organ shall be considered an act of that State, under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of State, and whatever its character as an organ of the central Government or of a territorial unit of the State.” The type defined in Article 4 (1) means that the organ directly executes the conduct without the help of any agent or the third person.

In the comfort women system, there was some conducts by the Japanese military which satisfied the definition of conduct of state organs in Draft Article 4 (1). The permanent mission of Japan to the United Nations office at Geneva, through Note Verbale March 26, 1996, disclosed the results of a study conducted by the government itself through July 6, 1992. According to the study, the government admitted that even though most comfort stations were run by private operators, there were also cases when the Japanese military directly operated the comfort stations. Even in the case of privately-run facilities, the Japanese military was involved in the

⁴³Texts available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

⁴⁴Draft Article 1 of ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001.

⁴⁵Draft Article 2 of ILC Draft Articles 2001.

establishment and the management of the stations through the granting of permission to open such facilities, supplying the equipment used in the stations and drafting the regulations regarding hours of operation, tariffs and precautions for the use of the facilities. The role of the government was not only limited to the establishment process. Instead, it continued to supervise the comfort women by imposing measures such as the mandatory use of contraceptives, regular health check-up conducted by military doctors to prevent venereal epidemics and hygiene management measures for the women and facilities.⁴⁶

The study conducted through 1992 by the Japanese government also found that the Japanese imperial government's administrative or military personnel directly took part in the recruitment of comfort women on several occasions. Then, the women were transported by military ships and vehicles to war zones. For the purpose of travel, the Japanese military had to approve the requests made by recruiters for such travel. In order to avoid suspicion, they gave the status of special civilian personnel serving in the military to the women so that they could obtain travel permits. The status was proved by certificates of identification issued by the Japanese government.⁴⁷

The official documents regarding comfort women practice can be found in a compilation called *Jugun Ianfu Shiryo-shu* (hereinafter JIS). This is a compilation of relevant parts extracted from 106 official documents related to the comfort women issue. The compilation was found within the Archives of the Defense Research Institute (ADRI) in Tokyo between the late 1980s and early 1990s. One of the documents which shows direct involvement by the military is the set of written instructions prepared by the Japan Ministry of War entitled "Matters related to the recruitment of female and other employees for military comfort stations," which was

⁴⁶ United Nations, Economic and Social Council, Commission on Human Rights, *Note Verbale dated March 26, 1996* by the Permanent Mission of Japan to the United Nations Office at Geneva, E/CN.4/1996/137 (1996), 16.

⁴⁷ *Ibid.*, 17.

issued on March 4, 1938 to the Chief of Staff of the North China Area Army and Central China Area Army. It states:

In recruiting female and other employees from Japan for the establishment of comfort stations...some deliberately make an illicit claim that they have permissions from military authorities, thus damaging the Army's reputation and causing misunderstanding among the general population...In future, when recruiting those women, each Army must tighten control of the selection procedure by carefully selecting appropriate agents. In actual recruitment, each Army must work in closer cooperation with local *Kempeitai* or police authorities, thus maintaining the Army's dignity and avoiding social problems.⁴⁸

Recent studies found that there were also some documents that recorded the transportation of women to war zones by the Japanese Imperial Army and Navy. The women who worked as comfort women outside of their home country would have gone through several steps as part of the travel documentation process. First, the women would be categorised as members of a working entertainer group. Then, the Imperial Army or Navy would issue a certificate of approval to travel. Once obtained, the certificate would be brought to the local police office and the police would issue a travel identification card.⁴⁹

Between 1938 and 1939 there was significant increase in cross-border travel from Korea to China, Taiwan and Manchuria. This indicated that comfort women were being transported in large numbers overseas. Particularly, it was found that most of the identification cards and cross border related documents were issued by the Japanese Government-General in Taiwan and the documents are believed to be kept in the National Archives of Japan.⁵⁰

In addition to the type of conduct under the category of Draft Article 4 (1), Japan was also responsible for the omission by failure to investigate and prosecute the perpetrators of forced prostitution, torture, war crimes and other gross violations of

⁴⁸ Government of Japan, Archives of the Defense Research Institute, "Document No.6," in *Jugun Ianfu Shiryō-shū* (JIS), ed. Yoshimi Yoshiaki (Tokyo: Otsuki Shoten, 1992), 105-107.

⁴⁹ Sin Cheol Lee and Hye In Han, "Comfort Women: A Focus on Recent Findings from Korea and China," *Asian Journal of Women's Studies* 21:1 (2015): 46.

⁵⁰ *Ibid.*, 45.

human rights committed against the women under the comfort women system. The failure was proved by a controversial policy issued by the Japanese government in the 1950s regarding the rehabilitation and release of surviving war criminals convicted in international military tribunals.⁵¹

Although Japan has stated that civil or criminal cases concerning World War II would now be deemed expired by the applicable statute of limitations provisions, it is well established that there is no statute of limitation to prosecuting serious crimes under international law. This idea was supported by the Special Rapporteur of the Sub-Commission on the impunity of perpetrators of violations of civil and political rights, Louis Joinet. In his report, Joinet noted, “Prescription is without effect in the case of serious crimes under international law...it cannot run in respect of any violation while no effective remedy is available.”⁵² The exemption of the statute of limitation in the case of gross violations of human rights is one of the principles outlined in the Basic Principles and Guidelines on the Right to Remedy and Reparation. It states, “Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.” The same also applies to the domestic statutes of limitations for civil claims and other procedures.⁵³ This principle is binding on every member of the United Nations since it was codified in General Assembly Resolution No. 60/147.

⁵¹ Hisakazu Fujita, “The Tokyo Trial: Humanity’s Justice v. Victor’s Justice,” in Yuki Tanaka and Tim McCormack, *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited*, ed. Gerry Simpson (Leiden/Boston: Martinus Nijhoff), 16.

⁵² United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political): Revised Final Report* by Louis Joinet, E/CN.4/Sub.2/1997/20/Rev.1 (1997), 8.

⁵³ United Nations, General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violation of International Human Rights Law and Serious Violations of International Humanitarian Law*, Resolution No. A/RES/60/147 (2006), 5, paras. 6-7.

Those aforementioned facts demonstrate that on the contrary to the denial that the comfort women worked in brothels operated by private businessmen, the operations and management of those brothels were directly conducted or with the knowledge and support from the Japanese military. Thus, it satisfies the criteria of “conduct by state organ attributable to state” stipulated in Draft Article 4 (1).

Draft Article 8 regulates that the conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is, in fact, acting on the instructions, direction or control of that state carrying out the conduct. In the case of comfort women, these acts depicted by the control of the Japanese colonial government over private agents (both Japanese and locals) who ran and operated the comfort stations, as well as those who procured the young girls and women by means of force and deception.

Proof that the private operators of the comfort stations were controlled by the Japanese government was recorded in documents investigated by the Japanese government from December of 1990 to June of 1991. For instance, the *investigation* documented in a compilation entitled *Iwayuru Jugunianfu Monndai ni Tsuite* (On the issue of so-called military comfort women) published in 1993 confirmed that the Japanese Imperial Army was involved in selecting personnel for recruiting the comfort women. It also prepared and distributed Comfort Station Regulations in the form of booklets to guide private entities on how to operate the stations and issued identification cards to personnel linked to the comfort stations.⁵⁴ These documents proved that the conduct of the private operators of comfort stations could be attributed to the Japanese government since they acted based on the instructions, direction or control of the government’s imperial army.

More proof was found in recent studies that concluded that the recruitment of comfort women in Korea was conducted within the framework of the Labour Affairs

⁵⁴ Karensusyei 1997f, Naikakukambo Naikakugaisei Shingisitsu [Council on External Affairs of the Cabinet Secretariat], *Iwayuru Jugunianfu Monndai ni Tsuite* [On the issue of so-called military comfort women] (1993).

Control Act as a part of the colonial National Total Mobilization regime of Japanese imperial government imposed on Korea as an annexed territory and it involved the role of private Japanese brokers. In accordance with the Employment Agency Ordinance passed in 1940, the Japanese brokers who wanted to recruit comfort women came to Korea and submitted applications to the Japanese government authority in Korea. Then, the brokers in Korea, who received a license from the Provincial Governor, a local administrative clerk or the police would recruit the comfort women.⁵⁵ The overall recruitment process and the role of the brokers were depicted in a publication entitled *Ilponkun wianso kwalliin ui ilki* (The Diary of a Japanese Military Comfort Station Manager) published in 2013.⁵⁶

Following the example of proof provided in the aforementioned paragraphs, it can be concluded that the role of brokers and private operators of comfort stations are identical with the category of “conduct of private persons or entities attributable to state” stipulated in Draft Article 8 of 2001 ILC Draft Articles. Thus, since the actions under the category were attributable to the Japanese imperial government, they bore the state responsibility of Japan.

Special rapporteur McDougall stated in her 1998 report that there are at least three different sources of law used as legal frameworks of responsibility in sexual slavery and sexual violence. The three sources are international human rights law, international humanitarian law and international criminal law. Each of these has its roots in treaties and customary international law. Therefore, these three sources of law are also applicable to Japan in the case of comfort women. However, the regime of individual responsibility in international criminal law will be excluded since the

⁵⁵ H.Han, “Ch’ongdongwon ch’ejeha Chigop sokaeryong kwa ilponkun wianpu tongwon: Chekuk Ilbon kwa sikminji Choson ui cha’abyoljok chedi unyong ul chungsim uiro” [The Administration of the Employment Act under the National Mobilization regime and the mobilization of military comfort women: Focused on the differentiated administration on the law in metropolitan Japan and colonial Choson], *Sarim*, No.46 (2013): 371-413.

⁵⁶ Park, *Ilponkun wianso kwalliin ui ilki* [The Diary of a Japanese Military Comfort Station Manager], trans. An Byong-Jik (Seoul: Isup, 2013).

research will only revolve around the responsibility of Japan as a state.⁵⁷ Specifically, McDougall also stated that there are three types of the most egregious international crimes that fall under the comfort women practice, which Japan is responsible for. They are the crimes of slavery, crimes against humanity and war crimes.⁵⁸

By taking into consideration McDougall's opinion that limited the comfort women issue around the scope of international human rights and humanitarian law, in 2009, the CEDAW Committee found that Japan had violated international obligations under several international agreements pertaining those two fields. Japan was a party to the following international agreements:

1. The conventions concerning traffic in women in 1910s and 1920s

Japan was a signatory to the following conventions in 1925:

- International Agreement for the Suppression of White Slave Traffic of 1904
- International Convention for the Suppression of White Slave Traffic of 1910
- International Convention for the Suppression of Traffic in Women and Children 1921

Japan was required under Article 2 and 3 of the 1921 Convention to prosecute persons engaged in the trafficking of women and children. These provisions were applied for most of the comfort women were minors. Japan argued that its colonized territories could not be included in the *ratione territorii* of the convention. However, the convention regulated that the obligation remains intact regardless of the victim's state of origin.⁵⁹

2. The 1930 International Labour Organisation Convention Concerning Forced Labour (ILO Convention No.29)

⁵⁷ McDougall, *Report on Contemporary Forms of Slavery* 1998, 10.

⁵⁸ Ibid., 38.

⁵⁹ United Nations, Committee on the Elimination of Discrimination against Women, *An NGO Shadow Report to CEDAW: Japan, The "Comfort Women Issue"* (New York: United Nations, 2009), 7.

Japan ratified this convention in 1932. ILO Committee on Experts on the Application of Conventions and Recommendations (CEACR) pointed out that Japan's military sexual slavery until 1945 was in breach of this convention.⁶⁰

3. Japan also violated its obligation under an international humanitarian law treaty, The 1907 Hague Convention on Land Warfare and Its Regulation. It ratified this convention in 1911.

Japan also violates international customary law as expressed in the 1926 Slave Convention, although Japan was not the party of this convention. The prevailing customary international law consists of three kinds of responsibilities:⁶¹

1. Slavery and the slave trade

Slavery and the slave trade were prohibited even when the comfort women system were established. It has clearly attained *jus cogens* status since the nineteenth century when many countries had already banned the importation of slaves. The prohibition was followed by the development of multiple international agreements so that it marked the formation of *opinio juris necessitatis* among states until it was codified in the 1926 Slavery Convention. State practice was also achieved as all the states prohibited slavery under national laws, including Japan.⁶² Thus, its status as a customary international law has been declared at least since the beginning of World War II. As a result, Japan's denial that it did not have any obligation because it did not ratify the 1926 Slavery Convention was unacceptable since the obligation to prohibit slavery were born from customary international law.

2. Rape as a war crime

⁶⁰ ILO, Committee of Experts on the Application of Conventions and Recommendations (CEACR), *Compilation of the Individual Observation on the "Comfort Women Issue"* (New York: United Nations, 2009), 40-47.

⁶¹ McDougall, *Report on Contemporary Forms of Slavery*, 1998, 41-42.

⁶² M. Cherif Bassiouni, "Enslavement as an International Crime," *New York University Journal of International Law and Politics*, Vol. 23 (1991): 445-517.

The laws of war also prohibited rape and forced prostitution. It was held as a customary international law until it was codified in Article 27 of The Fourth Geneva Conventions. Although Japan has not ratified the conventions, it is well established that the conduct was prohibited under customary international law by at least around 1937, when the first comfort stations were established.

3. Crimes against humanity

The widespread and systematic enslavement of persons has been long recognised as a crime against humanity. So does the comfort women practice since it qualified the element of “slavery” and systematically applied to the Japanese imperial subjects. The sexual violence, which is regarded as an element of comfort women practice, has been explicitly listed as a crime against humanity when committed in the course of armed conflict and when directed against civilian populations.

Draft Article 31 of State Responsibility states that the responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act. The injury includes any damage whether material or moral caused by the conduct. In accordance with Draft Article 31, in order to release itself from the state responsibility Japan has to fulfil its duty to redress the victims. The forms of reparation shall take the form of restitution, compensation and satisfaction, either singly or in combination.⁶³

However, the government of Japan denied the duty to redress the victim under three grounds:

1. The right to reparation of individuals under international law was extinguished generally by the 1951 San Francisco Peace Treaty and the subsequent peace treaties concluded between Japan and the Asian countries.
2. Satisfaction to the victims had been delivered in the statement and apology by Chief Cabinet Secretary Kono Yohei in 1993.

⁶³ Draft Article 34 of ILC Draft Articles 2001.

3. Compensation to the survivors had been paid and distributed through Asian Women's Fund founded in 1995, with the letters of apology to each individual.

The denial was responded critically by the international community in Japan's 2009 periodical review session by the CEDAW Committee. First, 1951 San Francisco Treaty did not cover the countries and regions that are not parties or have not signed a bilateral peace agreement with Japan. The category may include the Democratic People's Republic of Korea (DPRK). Furthermore, the sexual damage suffered by women under the Japanese military was not addressed at all in the bilateral negotiation with the Asian countries, for example in the 1965 Treaty of Basic Relations between Japan and Republic of Korea.⁶⁴

Second, the satisfaction and compensation through government statements, as well as the Asian Women's Fund, was inadequate to redress the victims. Besides, Asian Women's Fund was a disguised private fund with government donation, thus it could not be deemed as official compensation. The government of Japan has never established the Diet for resolution through legislative and administrative approach to support the compensation.⁶⁵

It is suggested by the Special Rapporteur Coomaraswasmy in her 1996 report that the way to distribute the compensation should be official through the enactment of special legislation, so it enables the settlement of individual claims through civil lawsuits at Japanese municipal courts.⁶⁶ Another option is setting up a limited time framed special administrative tribunal to manage compensation claim, considering the advanced age of the survivors.⁶⁷

2.3.Failure of International Tribunals to Adjudicate the Case

When Japan surrendered to the Allied Forces, forced prostitution that constituted a type of war crime became one of the material jurisdiction in the

⁶⁴ CEDAW Committee, *An NGO Shadow Report*, 7.

⁶⁵ *Ibid.*, 10.

⁶⁶ Coomaraswamy, *Report on Violence Against Women*, 1996, 17.

⁶⁷ *Ibid.*, 31., para. 137.

International Military Tribunal for the Far East (hereinafter IMTFE) or Tokyo Trial. The tribunal was initiated on January 19, 1946 by seventeen members of the Allied Forces. It had material jurisdiction over crimes against peace, conventional war crimes and crimes against humanity. Each type of crimes was divided into more specific elements. For example, what constituted crimes against humanity included murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population.⁶⁸ Forced prostitution itself was included in the list of war crimes. However, there was no enumeration of rape and sexual slavery as either war crimes or crimes against humanity.

Regardless of the lack of explicit mention of rape or sexual slavery in the charter, the rape committed by the Japanese military in Nanjing was addressed in the indictment under the 1907 Hague Convention IV and 1929 Geneva Convention. However, neither rape and sexual slavery committed against the comfort women in Korea and Southeast Asian countries was addressed in the indictment, nor was the relevant evidence presented.

There were also charges against Japanese military officials who committed rape in the Dutch East Indies (Indonesia), but the evidence provided only covered Dutch and European victims. Korean and Indonesian victims were not thoroughly recognised.⁶⁹ This fact highlights that racial discrimination by Allied Force military authority who did not perceive the crime as serious unless it involved their own citizens. In other words, the trial was merely an exercise of the victors' justice.

It was peculiar that the sexual slavery was not included in the statutes of the IMTFE and that indictments delivered by the prosecutor in spite of the fact that United Nations War Crimes Commission listed not only rape but also "abduction of women and girls for the purposed of enforced prostitution" as grounds for

⁶⁸ Article 5 of The Charter of International Military Tribunal For The Far East, January 19, 1946.

⁶⁹ Ibid., 61-63.

prosecution.⁷⁰ The United Nations War Crimes Commission was set up before the trial in October of 1945 on behalf of 17 Allied nations and the body was responsible for ensuring the detention, trial and punishment of the listed war crimes.⁷¹ In other words, the mandate of the commission to include abduction and enforced prostitution should have been met with compliances by the Allied Forces, especially the prosecutors. However, in reality, the Tokyo trial only included rape as the type of war crimes proved in relation to the Nanjing incident and it failed to try the sexual slavery and enforced prostitution of the comfort women.

The failure to prosecute sexual slavery and enforced prostitution as part of the Tokyo trial was based on a number of presumed reasons, including the redundant focus on the defendants which resulted in ignorance of the victims, alleged fixation on crimes committed against victor nations and the construction of a victim hierarchy based on national identity, race, class and gender. There were also other reasons, such as the victims' reluctance to testify about the sexual violence they had experienced in front of the court.⁷² Japanese scholar Yuki Tanaka argued that the exclusion of sexual slavery was intentional in order to avoid exposure to the fact that the Allied Forces themselves had utilized the comfort stations under the framework of Recreation and Amusement Association (RAA) for almost one year, until all of the facilities were closed down in 1946.⁷³

Law scholars further alleged that another reason why the tribunal failed to address the systematic enslavement of the comfort women was the military tribunal's heavy dependence on reports and archives. Although there were many prosecution and defence witnesses, they were rarely present during the trial to give live testimony.

⁷⁰ United Nations, United Nations War Crimes Commission (UNWCC), *1948 History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: His Majesty's Stationery Office, 1948), 34.

⁷¹ Nicola Henry, "Memory of an Injustice: The "Comfort Women" and the Legacy of the Tokyo Trial." *Asian Studies Review* 37, No.3 (2013): 368.

⁷² Nicola Henry, *War and Rape: Law, Memory and Justice* (London/New York: Routledge, 2011).

⁷³ Tanaka, *Japan's Comfort Women*, 133-166.

Instead, they only submitted written affidavits.⁷⁴ This lack of individual participation in military tribunals inspired the foundation of the contemporary international criminal court which pays more attention to the victim participation.⁷⁵

In terms of procedural aspects, the tribunals were weakened by their emphasis on the individual responsibilities of the perpetrators. This ignored the fact that the active involvement of the Japanese military in the formation of the comfort women system depicted a form of organized crime supported by a state. Moreover, the damage caused by the system was massive and could not be remedied through individual responsibility alone. Thus, it was necessary to demand not only the individual responsibility of the perpetrators who were involved in the system, but also demand state responsibility from the Japanese government.

On December 8, 2008, the women's group, Violence Against Women in War-Network Japan (VAWW-NET Japan) held the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery (hereinafter Tokyo Tribunal 2000). The purpose of the tribunal was initially to demand that Japan take legal responsibility since crimes against comfort women failed to be prosecuted in IMTFE. However, the government of Japan was not represented at the tribunal despite the invitation. Instead, the tribunal focused on gathering testimony from the victims, highlighted the continuous denial of the right to compensation, as well as the impunity of the perpetrators.

Evidence from sixty-four former comfort women living in the two Koreas, the Philippines, Indonesia, East Timor, China and the Netherlands was gathered and recorded. The indictment and evidence of the injustice of the Japanese military's comfort women system were presented by the international prosecutors from ten countries before a panel of international judges. Four prominent international

⁷⁴ Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001).

⁷⁵ Linda M. Keller, "Seeking Justice at the International Criminal Court: Victims' Reparations," *Thomas Jefferson Law Review*, 29 (2) (2006): 189-218.

lawyers, led by Gabrielle Kirk McDonald, former President of the International Criminal Tribunal for the Former Yugoslavia as the presiding judge, served as judges for the tribunal.⁷⁶

Tokyo Tribunal 2000 issued its final judgment in The Hague on December 4, 2001. Although its ruling was non-binding, the tribunal returned some significant findings on Japanese legal responsibility. First of all, the tribunal stated:

We note that women, either as individuals or as a group, did not have an equal voice or equal status to men at the time of the conclusion of the Peace Treaties, with the direct consequence that the issues of military sexual slavery and rape were left unaddressed at that time and formed no part of the background to the negotiations and ultimate resolution of the Peace Treaties. The Tribunal considers that such gender blindness in international peace processes contributes to the continuing culture of impunity for crimes perpetrated against women in armed conflict.⁷⁷

In other words, the judges emphasised the victim's right to adequate remedies and noted that such right was not extinguished by either the 1951 San Francisco Treaty or any other peace treaties concluded between Japan and Asian countries following World War II. Thus, the responsibility of Japan to provide redress to the women remains intact.

Conclusively, the tribunal stated that the comfort women system resulted widespread and systematic sexual violence that constituted war crimes and crimes against humanity. The judges of the tribunal also reiterated treaty obligations that Japan has violated, including the 1907 Hague Convention Respecting the Laws and Customs of Law on Land, the 1921 International Convention for the Suppression of the Traffic in Women and Children, and the 1930 ILO Convention Concerning Forced Labour. It also violated the norms of customary international law, including those prescribed in the 1907 Hague Convention and the 1926 Slavery Convention. Further, it urged the government of Japan to punish the perpetrators of the crimes

⁷⁶ CEDAW Committee, *An NGO Shadow Report*, 7.

⁷⁷ The Prosecutors and The Peoples of the Asia-Pacific Region v. Hirohito Emperor et.al. and the Government of Japan, PT-2000-1-T (December 4, 2001) at 252, para. 1051.

and provide redress to the victims.⁷⁸ However, the government of Japan has not followed the recommendations made by the tribunal until now.

Regardless of the inaction of Japan in carrying out the recommendations of Tokyo Tribunal 2000, the tribunal itself was successful in collecting valid evidence and identifying the elements of rape, sexual slavery, as well as providing proof of widespread and systematic elements of the comfort women system. It was also relatively more effective than the IMTFE which did not address sexual slavery and forced prostitution as part of its material jurisdiction. Moreover, the tribunal thrived from the stagnant progress of the case by identifying the individual perpetrators of the crimes.

In the Southeast Asian region, Temporary Court Martial Tribunal was also held in Batavia (currently Jakarta), Indonesia. It was a court administered by the Netherlands, representing the Allied Forces. The court found that the Japanese military defendants, who had participated in enslaving 35 Dutch women and girls in comfort stations, guilty of war crimes for rape, coercion into prostitution, abduction of women and girls for forced prostitution and ill-treatment of prisoners.⁷⁹ However, the court failed to provide redress to the Indonesian women and girls as victims due to the indifference and racial discrimination by the Netherlands within Indonesia, its former colony.

2.4. International Responses to the Comfort Women Issue

As a response to the gross violation of human rights conducted by Japanese military towards the comfort women during the World War II, the CEDAW Committee issued a recommendation as a response to the Universal Periodic Review on the compliance of Japan to the CEDAW in 2009. The recommendation urges Japan to find a lasting solution for the situation of comfort women which would include the compensation of victims, the prosecution of perpetrators and the

⁷⁸ Ibid. at 213-217, paras. 924-929d.

⁷⁹ McDougall, *Report on Contemporary Forms of Slavery*, 1998, 16.

education of the public about these crimes, for instances through the establishment of museum or memorial and the inclusion of comfort women issue in the history book used in schools.⁸⁰

UN Working Group on Contemporary Forms of Slavery, as the main forum for comfort women in the 1990s, recommended that Japan and victims' national states to consider submitting the dispute about comfort women to the Permanent Court of Arbitration (PCA) since the arbitral body is open to all states as well as individuals. The idea was supported by the comfort women activists, such as the Korean Council. However, this seems to be the least preferred solution to the state parties, probably due to the apprehension of diplomatic relations severance.⁸¹

Another form of international pressure voiced by victims' national states, including Korea, is the strong demand that Japan should be banned to gain a permanent seat on UN Security Council unless it resolves the issue of the wartime comfort women. Korea and the former comfort women opposed Japan's UN Security Council bid in 1993.⁸² The protest was repeated in 2005 and was conveyed to UN Secretary-General Kofi Annan during the UN Conference on Conflict Prevention.⁸³ The People's Republic of China also led the same protest from 2007 to 2008 following controversial statement of Japan Prime Minister, Shinzo Abe, who denied the coercion and recruitment of the comfort women.⁸⁴

⁸⁰ United Nations, Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Elimination of Discrimination against Women*, CEDAW/C/JPN/CO/6 (August 7, 2009), 1-13.

⁸¹ United Nations, Economic and Social Council, *Report of the Working Group on Contemporary Forms of Slavery* (1994), E/CN.4/Sub.2/1994/33, 101, paras. 94-95.

⁸² Michelle Magee, "War Victims' Demands Delay Japan's U.N. Council Bid," *San Francisco Chronicle*, October 16, 1993.

⁸³ "Comfort Women Fight Japan's UNSC Bid," *KBS World Radio* online, last modified July 16, 2005, http://world.kbs.co.kr/service/news_view.htm?lang=e&Seq_Code=27514.

⁸⁴ Earl Kinmonth, "Comfort Women Statues? Build Them for All, Not Just Some, Victims of Wartime Sexual Violence," last modified June 14, 2018, <https://japan-forward.com/comfort-women-statues-build-them-for-all-not-just-some-victims-of-wartime-sexual-violence/>.

Chapter 3. Comparison of Diplomatic Protection Measures for Comfort Women in Korea and Indonesia

This section will elaborately compare how the Republic of Korea and Indonesia constructed systems of diplomatic protection on behalf of victims of Japanese military sexual slavery who are nationals of the two states. The explanation is built gradually, starting with the general situations of the comfort women in both states. Then, it will move to the *post-facto* struggle of comfort women, such as the rise of activists who help the women struggle to win their rights back and the effort to exhaust local remedies in the domestic courts. It will also highlight the attitudes of the governments of the two states in handling the former comfort women by recalling the responses of the governments to the offer from a Japanese private fund. It will also examine the governments' roles in enacting regulations and measures to protect the rights of these women. These series of events will lead to the conclusion of whether diplomatic protection has been achieved and whether the process provides satisfying results to the victims.

3.1. Comfort Women in Korea

Sexual exploitation of Korean women through what are termed comfort women cannot be separated in long history of the Japanese colonization of Korea. Korea was annexed by Japan in 1905, after Japan's victory in the Russo-Japanese War. The victory also saw the British and Americans accept Japan's control over Korea.⁸⁵ Following the victory, the so-called "Japan-Korea Annexation Treaty" was sealed on 22 August 1910.⁸⁶ The colonialization period then lasted until August of 1945.

Korean comfort women were not only recruited to work as military sex slaves in Korea and Japan but also in other territories occupied by the Japanese, such as

⁸⁵ Tanaka, *Japan's Comfort Women*, 33.

⁸⁶ Mark Caprio, *Japanese Assimilation Policies in Colonial Korea 1910-1945* (Seattle: University of Washington Press, 2009), 82-83.

China, Taiwan and countries in Southeast Asia. The records of forced mobilization of these women have been kept as evidence thus far in certain museums in Japan, Korea and China. For instance, The National Archives of Korea (NAK) claimed to keep a large number of papers on cross-border travel IDs issued by the Japanese government-general of Taiwan to mobilize women from Korea to Taiwan. Other documents were permits for travelling and for entry into Jinan, China, issued by the Japanese colonial government on January 14, 1938. It identified the travel records of 115 Korean women who were sent to Jinan. In the documents there were mentioned “comfort station” and the women were identified as the “special ladies,” *kisaeng* (artist), *chakpu* (bar hostess) and *yokup* (bar girl).⁸⁷

Koreans accounted for approximately eighty per-cent of all comfort women, the greatest share compared to the number of comfort women who hold other nationalities. This occurred not only because of the political and economic environment of the country as a Japanese colony at that time, made young women easy to procured, but also because of its cultural closeness to Japan. In addition, the physical similarity between Japanese and Koreans may have been a factor in the preference to procure comfort women from this country.⁸⁸

Japan began to draft Korean women for the sexual service around 1937, following the rape of Nanjing incident. The Japanese army began carefully to select and control the recruiting of brothel agents approximately in 1938. Some of them were Japanese and some were Koreans. The majority were those who had experiences in the prostitution business, labour brokers and the like.⁸⁹

Most of the girls and young women were also coercively recruited under the *Cheongsindae* (Voluntary Labour Service Corps). *Cheongsindae* was part of the National General Mobilization Law imposed on Korea by the Japanese government. In this framework, both men and women were called upon to contribute to the war.

⁸⁷ Sin-Cheol Lee et al., “Comfort Women: A Focus on Recent Findings,” 49-52.

⁸⁸ Ibid., 32.

⁸⁹ Tanaka, *Japan's Comfort Women*, 38.

Systematic mobilization was enforced in 1939. Japan sent Korean labourers to Japan, Sakhalin, the Soviet Union and to other parts of Asia. Although in reality some women integrated in *Cheongsindae* volunteered to work in factories and hospitals, many were recruited with deceit, in the form of false promises of employment with good compensation, and be sent to Japan or in the other Japanese occupied territories. Indeed, contrary to the promises, they were sent to comfort stations to work as sex slaves.⁹⁰

Under the framework of *Cheongsindae*, Japanese police in Korea collaborated with labour brokers to recruit women. Usually, the daughters of poor families were approached by the labour brokers and promised jobs as factory workers, nurses, laundry workers, kitchen helpers or other types of labour which were prevalently performed by women. From recruitment until the transportation process, the women were treated well, but the treatment changed as soon as they arrived at their working destinations. Without knowing the nature of the work initially, they were brought to the comfort stations and they experienced sexual violence by the members of the Japanese armed forces.⁹¹

There were several occasions when local policemen themselves acted directly to run comfort stations. The police usually used force or threats to make the girls follow their orders. In other words, this method could be defined as kidnapping. After arresting the girls, the policemen detained them in the police stations or detention centers, from which they could not escape because the places were heavily guarded by the Japanese soldiers.⁹²

When the young girls realized the true nature of the work, they attempted to refuse the job. Some demanded that their comfort station managers send them back home because they were promised false employment. The manager typically

⁹⁰ Study by the Korean National History Compilation Committee, reported in *Korea Times* (Los Angeles Edition), June 15, 1992 in Chunghee Sarah Soh, "The Korean 'Comfort Women': Movement for Redress," *Asian Survey*, Vol.36, No.12 (1996): 1227-1229.

⁹¹ Tanaka, *Japan's Comfort Women*, 38.

⁹² *Ibid.*, 40.

responded by saying that a large advance payment had been made to their parents and it had to be paid back before they would be sent back home.⁹³

Comfort stations where the women lived varied from hotels, restaurants and expropriated civilian houses. Sometimes Japanese converted schools and temples for such purposes. In cases of remote front lines of a battle zone, military tents or parts of army barracks were used.⁹⁴ While living in these comfort stations, Korean comfort women mainly experienced sexual slavery by Japanese soldiers and the owners of the brothels on a daily basis.⁹⁵ Other than sexual slavery, they also experienced sufferings resulted from inhumane living conditions. For instances, regulations to prevent venereal diseases were unfollowed, and therefore many comfort women suffered from these diseases. The sexual crimes also caused the women to suffer from other reproductive diseases. There were times when pregnancy was unavoidable, thus forced abortions was common. The comfort women also rarely received any payment from their managers. They even physically punished the women when they failed to meet their target, when they were infected with VDs or when they became ill.⁹⁶

The situations of the comfort women varied when the war ended. Many of them died owing to the sufferings as a comfort women itself or because of suicide. Others were killed by soldiers to erase war secrets or died as a result of direct involvement in the warfare. Most of the comfort women who worked away from their home countries were simply abandoned by the Japanese. Some of them were rescued by the Allied forces and eventually sent home. However, some decided not to go home because they felt ashamed by the sexual abuse they had experienced and were afraid to meet their families and relatives again.⁹⁷

⁹³ Ibid., 50.

⁹⁴ Ibid., 50.

⁹⁵ Ibid., 52-59.

⁹⁶ Ibid.

⁹⁷ Ibid.

3.2. Comfort Women in Indonesia

In contrast to the Korean comfort women, there are very few studies regarding the comfort women system in Indonesia. The scarcity of studies may be caused by the fact that the colonization time of Indonesia was far shorter than that of Korea. As a result, fewer women were victimized. According to information compiled by *Komisi Nasional Hak Asasi Manusia* (Indonesian Commission for Human Rights) and *Jaringan Advokasi Jugun Ianfu Indonesia* (Indonesian Comfort Women Advocacy Network), approximately 25.000 former comfort women have been identified in Yogyakarta and Bandung city. However, there remain many from other cities who have not been identified.⁹⁸

It all started when Japanese troops conquered the Dutch and seized its colony, the Dutch East Indies (current Indonesia). On March 8, 1942, the Dutch forces, led by General *Ter Poorten*, officially surrendered to Japan. This became the beginning of a three and a half year occupation of Indonesia by Japanese Imperial forces.⁹⁹

The first target for comfort women recruitment consisted of Dutch women who were still living in Indonesia at that time. Nevertheless, Indonesian local women recruited as well.¹⁰⁰ The recruitment of Indonesian comfort women was slightly different from how their peers in Korea were recruited. Instead of deception, they used kidnapping as a means of recruiting women from low economic classes. Japanese policemen randomly selected women working at restaurants or walking on the street. They were taken to the police station and interviewed by a Japanese officer as to whether they had venereal diseases or not. Those who admitted that they were healthy were brought to a hotel for further examination by a Japanese military doctor. The women who passed this examination were detained in the hotel before they were

⁹⁸ “*Jugun Ianfu Bukan Wanita Penghibur* [Comfort Women are not Prostitutes],” *Kompas* online, last modified November 25, 2010, <https://nasional.kompas.com/read/2010/11/25/17135956/Jugun.Ianfu.Bukan.Wanita.Penghibur...>

⁹⁹ Tanaka, *Japan's Comfort Women*, 61.

¹⁰⁰ B.W. Horton, “Comfort Women”, in *The Encyclopedia of Indonesia in the Pacific War*, ed. P.Post (Leiden: Brill, 2010), 186.

transported to other cities in Indonesia. Upon arrival in other cities, they were picked up by brothel managers and transferred to comfort stations.¹⁰¹

Instead of using force, the Japanese military authorities used deception to recruit Indonesian women from the upper middle classes. The Japanese military made it known to the public that the daughters of public civil servants would be offered the opportunity to study in Japan. This false information was passed on to local public servants through provincial Japanese residents or governors. Many Indonesian public servants who collaborated with the Japanese were pressed to show their loyalty to Japan, and thus they decided to send their own daughters first.¹⁰² The girls were put on a ship in the central harbour of Indonesia, Tanjung Priok. They believed that the ship was going to Japan, yet it went to one of remote islands of Indonesia. Among them, some were transported abroad, mainly to other Southeast Asian countries such as Thailand, New Guinea and Singapore. As soon as they arrived at their destination, they were put into a camp and were forced to serve Japanese soldiers sexually. When the soldiers moved to another island for a military operation, they were transported to that location as well, where they were put into a military compound.¹⁰³

In the comfort stations, each woman had to serve Japanese soldiers and officers every day. Each of them was expected to reach a designated target every week.¹⁰⁴ The practice continued until the end of the war. Many of the girls died as the result of this maltreatment. Others who could survive suffered psychological trauma for the rest of their lives. The brothel managers claimed to receive a decent amount of money from the soldiers as an exchange for the service, yet the comfort women rarely received payment from the managers. From these sequences of the story, it can be concluded that in terms of living conditions at comfort stations, the

¹⁰¹ Tanaka, *Japan's Comfort Women*, 77-78.

¹⁰² Mark Gayn, *Japan Diary* (Tokyo: Charles E. Tuttle Company, 1984), 212-215.

¹⁰³ Tanaka, *Japan's Comfort Women*, 79-81.

¹⁰⁴ Tanaka, *Japan's Comfort Women*, 79-81.

Indonesian comfort women situation was identical to that experienced by Korean comfort women.¹⁰⁵

Upon the end of the war, the Indonesian comfort women, who worked in Indonesian remote islands and overseas, were found by the Allied Forces, mainly Dutch and Australian. They gave the women medical treatment and rehabilitation with the intention of sending them back to their hometowns. However, some of the women were afraid to return home because of the shame related to their experiences, while some others committed suicide.¹⁰⁶

World War II came to the end and Japan surrendered to the Allied Forces. As a follow up to the 1951 San Francisco Treaty, which stated that Japan should pay reparations to Southeast Asian countries, the Treaty of Peace between Japan and the Republic of Indonesia was concluded in Jakarta on January 20, 1958. The treaty included a payment of US \$223 million over 12 years,¹⁰⁷ the cancellation of trade debt of US \$177 million¹⁰⁸ and US \$400 million of economic aid. The annex of the treaty explicitly specified that the money would be used to support Indonesian infrastructure projects such as those related to transportation, communication, power development, agricultural, fishery, industrial development, water supplies, education and social welfare.¹⁰⁹ However, there was no mention at all of reparation for the injuries suffered by Indonesian comfort women.

3.3.Existence of Comfort Women Activism

The activism of former Korean comfort women began when the Korean Church Women United sponsored the International Conference on Women and Tourism on Jeju Island in April of 1988. One of the speakers at the conference, Yun Chung-Ok

¹⁰⁵ Ibid.

¹⁰⁶ Ibid., 81-82.

¹⁰⁷ Article 1 (1) of Reparation Agreement between Japan and the Republic of Indonesia (Annexed to the 1953 Treaty of Peace between Japan and The Republic of Indonesia).

¹⁰⁸ Article II (1) of Protocol between The Government of Japan and the Government of The Republic of Indonesia Relating to Settlement of the Claims with Respect to Balances in the Former Clearing Accounts and Other Accounts.

¹⁰⁹ Annex of Reparation Agreement between Japan and the Republic of Indonesia.

of Ewha Womans University, presented her research on the *Chongsindae* issue to help the participants see the connection between comfort women in colonial Korea and the *kisaeng* tourism of modern Korea. Yun Chung-Ok then led various women's organisations along with Lee Hyo-Chae, her fellow professor at Ewha Womans University, to form the Korean Council for Women Drafted for Military Sexual Slavery by Japan or *Cheongsindae Munje Daechaek Hyeobuihoe* (hereafter the Korean Council) in 1990.¹¹⁰ The council is classified as a non-governmental organisation (NGO) and aims to achieve the resolution of the comfort women issue, as well as appropriate and adequate redress for both the deceased victims and the survivors. Not all members of the Korean Council are former comfort women, some of them are forced labourers drafted by the Japanese colonial government.

The Korean Council submitted a petition to the United Nations Commission on Human Rights (UNCHR) on March 4, 1992. The content of the petition was a request to the commission to investigate Japanese crimes committed against Korean women during the World War II and help to push Japanese government to provide reparations as a consequence of its internationally wrongful conduct.¹¹¹ The petition was received by the UNCHR Sub-Commission Working Group on Contemporary Forms of Slavery in May of 1992. The UNCHR responded by placing the comfort women issue on its official Geneva meeting agenda in August of 1992, where delegates from the Korean Council and one former comfort woman named, Hwang Keum Ju, testified her experience.¹¹²

The intense lobbying by the Korean Council resulted in the conclusion of the UNCHR's Sub-commission for the Prevention of Discrimination and the Protection of Minorities to condemn the Japanese military comfort women system as a crime against humanity that violated the international human rights of Asian women, Japan's international obligations under international humanitarian law and the ILO

¹¹⁰ Soh, "Movement for Redress," 1232-1233.

¹¹¹ Ibid., 1234-1235.

¹¹² Soh, "Prostitutes versus Sex Slaves," 70.

agreement prohibiting forced labour that Japan ratified in 1932.¹¹³ Thus, it officially marked the issue as elevated from a mere civil lawsuit to an international human rights problem of concern to the international community.

In August of 1991, with the support of the Korean Council, Kim Hak Sun from the Republic of Korea became the first former comfort women who spoke publicly about how she was abducted and work as a comfort woman in the comfort station at the age of 17. This testimony was followed by several unsuccessful lawsuits against the Japanese government before the Japanese domestic courts.¹¹⁴

Because the international pressure pursued by the Korean Council and former comfort women was not fruitful, the Korean Council initiated the weekly Wednesday noon demonstrations in front of the Japanese embassy in Seoul. The demonstration program started in January of 1992.¹¹⁵ Another activity hosted by the Korean Council was a nationwide fund-raising even in December of 1992 to help building the House of Sharing (*Nanum ui Jib*) for the survivors.¹¹⁶ In legal fields, the Korean Council advocated and facilitated the former comfort women to exhaust local remedies available in Japan. However, most of these efforts were done in vain due to the persistent denial from the Japanese government.

The most significant role of the Korean Council occurred in 2011, when it supported Korean comfort women in their effort to file a constitutional complaint regarding the omission of the Korean government for taking no steps to protect them. After the Japan-Korea bilateral agreement was achieved in 2015, it still protests to the government regarding the lack of a victim-centered approach in the execution of the agreement.

¹¹³ Alice Y. Chai, "Asian-Pacific Feminist Coalition Politics: The *Chongsindae/Juguianfu* (Comfort Women) Movement," *Korean Studies*, No. 17 (1993): 67-91.

¹¹⁴ Bonnie B.C. Oh, "The Japanese Imperial System and the Korean "Comfort Women" of World War II" in *Legacies of the Comfort Women of World War II*, ed. Margaret Stetz and Bonnie B.C. Oh (New York: Routledge, 2015), 16.

¹¹⁵ Nishino Rumiko, *Jugun Ianfu* [Military Comfort Women] (Tokyo: Akashi Shoten, 1992).

¹¹⁶ Committee for the Construction of the *Nanum-ui Chip*, *Nanum-ui Chip Charyojip* [Collection of Reference Materials] (Seoul: Committee for the Construction of *Nanum-ui Chip*, 1993).

The Republic of Korea appears to have the most persistent activists on the comfort women issue. This is likely triggered by the longer period of the colonisation of Korea (1910-1945), the treatment of Koreans as Japanese imperial subjects and the impact of Korean democratization in the late 1980s.¹¹⁷ In contrast, Indonesian comfort women activists were not as active due to the shorter term of Japanese colonisation period and the smaller number of victims. These factors were combined with the lack of robust criticisms toward the Japanese occupation, from either citizens or from the government side.¹¹⁸

While the activism of comfort women in Korea was initiated by the Korean citizens and the comfort women themselves, the activism of Indonesian comfort women was initiated by concerned Japanese human rights lawyers. In 1993, lawyers from the Japanese Bar (*Nichibenden*) paid a visit to the Indonesian Advocates Association (*Persatuan Advokat Indonesia*) in Jakarta. The purpose of the visit was to collect evidence pertaining to Indonesian war victims. Some of this evidence were related to the comfort women practice in Indonesia. Subsequently, matters were discussed in the symposium of the Japanese Bar Association in October of 1993 with the potential initiation of legal claims against the Japanese government. However, the Japanese lawyers certainly could not represent the interests of Indonesian comfort women due to the eligibility of representative issue.¹¹⁹ Therefore, they passed the case to the Indonesian Legal Aid Foundation (*Yayasan Lembaga Bantuan Hukum Indonesia*, hereafter LBH), which was the only human rights organisations allowed by the Indonesian government at that time.

LBH then called on all war victims, including the former comfort women, to come to its offices throughout Indonesia to collect their testimonies. LBH did not

¹¹⁷ C.Gluck, "Operation of Memory: 'Comfort Women' and The World," in *Ruptured Histories: War, Memory and The Post Cold War in Asia*, ed. M. Jagger and R. Mitter (Cambridge: Harvard University Press, 2007), 67-68.

¹¹⁸ Katharine McGregor, "Emotions and activism for former so-called 'comfort women' of the Japanese Occupation of the Netherlands East Indies," *Women's Studies International Forum* 54 (2016): 71.

¹¹⁹ Ibid.

work alone in the interview process, but in cooperation with several Japanese human rights activists. The Japanese activists served to convince the victims that their testimony would not be in vain because the potential existed to negotiate the problem with the Japanese government. However, they could not promise payment in the form of compensation.¹²⁰

The effort of LBH, helped by the Japanese activists, was fruitful in that more than one thousand women appeared at the LBH office in Yogyakarta. Most surviving women were willing to register their personal identities and provided testimony about their experiences of recruitment, detention and violence which had occurred in their past as comfort women. One of the survivors was Mardiyem.¹²¹ She told LBH that not only did she experience sexual violences, but also forced abortion by the Japanese soldiers. Her story was recorded by journalists and reported in at least five newspapers, including both local and Japanese newspapers. Through these articles, she demanded a personal apology from the Japanese government in written form and also from the Indonesian government.¹²²

The testimony of Mardiyem and several other former Indonesian comfort women did not receive a response from the Indonesian government. This was due to the higher value that the government attributed to its relationship with Japan. It also should be noted that the time when this testimony came to the fore was during the Soeharto regime.¹²³ The system was dominated by the military and the government strictly controlled the establishment and operation of any human right organisations, making it difficult for these organisations to proliferate.

Regardless of the ignorance of the Indonesian government, Indonesian comfort women disclosed their story in many international forums. For instance, they

¹²⁰ B.Hartono and D. Julianoro, *Derita Paksa Perempuan: Kisah Jugun Ianfu pada Masa Pendudukan Jepang 1942-1945 [The Sufferings of Forced Women: The Story of the Jugun Ianfu during the Japanese Occupation 1942-1945]* (Jakarta: Pustaka Sinar Harapan, 1997), 175-180.

¹²¹ McGregor, *Emotions and Activism*, 71.

¹²² E. Hindra and K. Koichi, *Momoye: Mereka Memanggilku [They Called Me Momoye]* (Jakarta: Esensi Erlangga Group, 2007), 124-126.

¹²³ McGregor, *Emotions and Activism*, 72.

attended the Tokyo International Forum on War Compensation for The Asia Pacific Region held in 1995 and spoke about comfort women issue on behalf of the other Indonesian survivors.¹²⁴

In August 1992, Ex-*Heiho* Communication Forum (former Indonesian Japanese colonial police) also offered help by registering 20,000 former Indonesian comfort women and collecting proof and testimony about their past. The results were submitted to the LBH Yogyakarta branch in the hope, that the institution would come forward to represent them by claiming the compensation from the Japanese government. Ex-*Heiho* consists of members, mainly men, who were enslaved as Japanese police officers and civil servants during the Japanese colonial period. The leader of the forum demanded US \$700,000 as collective compensation for the former Indonesian comfort women and Ex-*Heiho* members themselves. The demand was conveyed to the Japanese government at a meeting of the International Committee in Tokyo.¹²⁵ However, this effort did not receive a positive responses.

3.4. Government's Response to the Asian Women's Fund

The Asian Women's Fund (AWF) was a private fund established in 1994 by the Japanese government, consisting of donations from the Japanese public with some government support. The fund was highly controversial among the comfort women activists, particularly to the Korean Council because the Japanese government camouflaged the foundation as a private affiliation in order to avoid international legal responsibility. The activists persisted in demanding the admittance of legal responsibility and official compensation, which according to the prevalent international practice, must be withdrawn from the national budget and through

¹²⁴ Komisi Nasional Hak Asasi Manusia (National Commission for Human Rights) and Jaringan Advokasi Jugun Ianfu Indonesia (Indonesian Comfort Women Advocay Network), *Menggugat Negara Indonesia atas Pengabaian Hak-Hak Asasi Manusia Jugun Ianfu sebagai Budak Seks Militer dan Sipil Jepang 1942-1945 [Indicting Indonesia for Neglecting the Human Rights of 'Comfort Women' as Sex Slaves of the Japanese Military and Civil Servants 1942-1945]* (Jakarta: KOMNAS HAM, 2010), 21.

¹²⁵ Didi Prambadi and Selichi Okawa, "Setelah Pemerintah Jepang Tak Bisa Mengelak Lagi [After the Japanese Government Could No Longer Avoid It]," *Tempo*, July 1992, 15.

national legislations by the delinquent state. This section will discuss how the government of Korea and the government of Indonesia responded to the AWF proposal.

The government of the Republic of Korea was initially supportive of the establishment of the AWF. However, the attitude changed to reluctance after the Korean Council vigorously campaigned for repudiation against the AWF. The comfort women showed mixed responses. Some criticized the fund and rejected it, while others wanted to accept the financial benefits, although some in this group were not satisfied with the establishment of the fund.¹²⁶

In December of 1996, a dialogue team composed of members of the AWF Advisory Committee paid a visit to Korea and met several victims in order to explain the fund's project. Kim Hak Sun and two other comfort women stated their repudiation of the projects of the fund. Others stated that it was not acceptable to consider the fund as a sincere move. In December of 1996, one of the victims announced that she accepted the efforts made by AWF and was willing to receive the benefits of the projects. However, the Korean Council and the Korean government hindered her intention with criticism. The AWF was only successful to deliver Prime Minister's letter of apology and money to seven victims at a hotel in Seoul in January of 1997. The Korean government reacted by excluding the seven women from receiving the monthly allowance provided by the Korean government as a substitution for Japanese official compensation. Due to strong public and government criticism of every move made by the fund, the AWF decided to discontinue its project in the Republic of Korea.¹²⁷

The Korean Council explained the reasoning behind why they strongly refused the presence of the AWF on the occasion of the Japan Sixth Universal Periodic Report to the CEDAW Committee in 2009. The main reason for the refusal was that

¹²⁶ "The Comfort Women Issue and the Asian Women's Fund," Asian Women's Fund, accessed February 21, 2019, <http://www.awf.or.jp/pdf/0170.pdf>, 31.

¹²⁷ Ibid., 32.

while Japan may claim that the fund had been sponsored by the government, it did not state clearly that it was in the name of the State of Japan. Thus, it did not reflect Japan's acceptance of responsibility for its international crimes. The Korean Council reiterated the survivors' statement that the monetary gesture insulted them and strongly demanded justified and lawful compensation that is in proportion to the crimes.¹²⁸

The Korean Council cited several opinions of the international scholars about the nature of the AWF. First, it cited the opinion of Special Rapporteurs Radhika Coomaraswamy and Gay J. McDougall that the nature of the fund was not official and legal. The judges of The Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery stated that the AWF was not official because it did not constitute an acceptable mechanism for distributing compensation to the victims for the wrongful acts inflicted by the state. ILO CEACR also added that the manner of compensating the victims should be such that it will meet their expectations, instead of through unilaterally establishment of a private fund.¹²⁹

The Korean Council added its own argument that the secretive method of providing funds to the victims, instead of distributing them officially through support organisations, such as Korean Council itself, reflected the intention of Japan to refuse giving the impression that it accepted its legal responsibility. The secretive method triggered distrust between the victims and support organisations. Moreover, the establishment of the AWF and its activities had no legal basis according to Japanese domestic law.¹³⁰

The AWF did not initially acknowledge that there were comfort women from Indonesia perhaps due to the less vocal attitude of Indonesian activists. Thus, the

¹²⁸ The Korean Council for the Women Drafted for Military Sexual Slavery by Japan, "Shadow Report on the UN CEDAW: Japan's Violation of the Convention and Responsibility Regarding 'Comfort Women' Issue," (paper, Committee on the Elimination of Discrimination against Women 44th Session Meeting, July 2009),16.

¹²⁹ Ibid., 17.

¹³⁰ Ibid.

activists strongly demanded the Indonesian government to let the AWF realize their existence. The Indonesian government used this offer to suppress activists' voices by signing a deal with the AWF in November of 1996. The government, represented by the Indonesian Minister of Social Affairs, Intan Soeweno, received a lump sum of three hundred and eighty million yen. However, not individual victims but the Ministry had received the money. The money was used to support a nursing home projects for elderly Indonesians in towns where the comfort facilities had operated. The project was executed between 1997 and 2003.¹³¹ It was claimed that the project aimed to improve the social welfare of former comfort women, but in reality, not all living victims enjoyed the facilities. Moreover, enjoyment was impossible for the deceased victim and their families. They were supposed to receive individual compensation rightfully and yet did not receive any from the AWF.

AWF offered the Indonesian government two types of projects, namely the projects that directly benefited the comfort women individually and the projects that gave collective benefits. The Indonesian government chose the second type. Intan Soeweno, the Social Affairs Minister of Indonesia during the Soeharto's era, defended her decision in choosing AWF's assistance to build welfare facilities over projects benefiting individual former comfort women with several reasons. First, it would be extremely difficult to authenticate actual former comfort women. Second, it was important to protect the honour of the former comfort women and their families and disclosing the issue to AWF and the public would taint their honour. Third, the question of war reparations from Japan to Indonesia had already been settled by two accords, specifically the Treaty of Peace between Japan and the Republic of Indonesia (hereafter the Treaty of Peace or the Peace Treaty) and the Reparations Agreement between Japan and the Republic of Indonesia. Therefore, it

¹³¹ Ibid.

was considered too late to re-negotiate this issue given that it took a long time for the Indonesian comfort women to step forward.¹³²

The Social Affairs Minister's remarks, which were delivered on November 14, 1996, depicted the ignorance of the government with regard to the rights of former Indonesian comfort women. The attitude revealed by stating that it is the culture of the Indonesian people to not open up the shameful past of Indonesian women and that it was too late to settle the problem using the Peace Treaty, was seemingly used to cover up the intentional reticence of the government to openly initiate legal claims against Japan and instead, choosing to receive the AWF fund.

Indonesian comfort activists were not satisfied by the decision of the Indonesian government for not allowing individual payments to the victims. However, there were no efforts to improve the situation. Research and data collection about these matters are gradually coming to a halt. It appears that the activism is cooling down these days as the number of survivors is waning.

3.5.Exhaustion of Local Remedies

There were several occurrences where local remedies had been sought by Korean former comfort women but mostly were unsuccessful. The first local remedy was initiated by Kim Hak Sun, the first Korean comfort women who told her story in an international forum. She and a group of Koreans filed a lawsuit against the government of Japan for damages incurred during the Pacific War in December of 1991. She was sponsored by the Association of Pacific War Victims and Bereaved Families at that time.¹³³

Other former comfort women initiated separate lawsuits. One was filed in 1993 by four former members of *Cheongsindae* at the Shimonoseki branch of the Yamaguchi District Court over their abduction to Shimonoseki to be comfort women

¹³² Ibid., 40-41.

¹³³ Soh, "Movement for Redress," 1233.

during the war. They demanded an official apology and compensation of damages for \$2.29 million.¹³⁴

On February 6, 1994, the Korean Council and twenty-seven comfort women survivors filed a criminal complaint with the Tokyo District Public Prosecutors Office in order to seek criminal investigations and prosecution of the perpetrators of these crimes against the women. Nevertheless, the claim was in vain because it was not accepted on the grounds of being past the statute of limitation. Missing names of the perpetrators and facts damaged the case, as did the inadequacy of the penalty articles.¹³⁵

Similarly, the Japanese High Court of Justice rejected the appeal of a former Korean comfort woman on November 30, 2000. The court acknowledged her suffering, but held that she, as an individual, did not have the right under international law to file a claim for compensation against a state. The court also stated that the statute of limitations for Koreans living in Japan to claim compensation for war damages had ended in 1985.¹³⁶

In September of 2000, a group of fifteen former Korean comfort women filed a class action suit in Washington District Court demanding compensation for crimes committed against them.¹³⁷ The suit was filed under the jurisdiction granted by the US Alien Tort Claims Act (ATCA) of 1789. This act permits foreigners to file any civil action against foreigners only for tort, committed in violation of the law of nations or a treaty of the United States.¹³⁸ This also includes human rights violation cases. The federal court dismissed the claims on the grounds that Japan could not be sued because it had not waived its sovereign immunity and the court was not the proper forum for this type of tort. Instead, the court recommended that the claimants

¹³⁴ *Korea Times*, January 6, 1993 in Soh, "Movement for Redress," 1233.

¹³⁵ Totsuka Etsuro, "Kankokujin Higaishara Gojyunen Buri ni Kokuso Kokuhatu [Korean Victims Bring Criminal Complaints After 50 Years]," 472 *Hogaku Semina*, No.104 (1994): 104-105.

¹³⁶ "Japanese Court Rejects Korean Comfort Women's Appeal," *Korea Times*, December 1, 2000.

¹³⁷ Ji Young Soh, "Civil Tribunal to Convene on Wartime Sex Slavery Crimes of Japan," *Korea Times*, November 9, 2000.

¹³⁸ 28 U.S. Code § 1350.

use interstate (government to government) mechanisms to resolve the issue. The claimants appealed to the US Supreme Court only to have the dismissal upheld.¹³⁹

Generally, the comfort women who initiated local remedies presented similar demands. The demands are (1) a formal apology to individuals, (2) recognition of the existence of the comfort women system, (3) Japanese governmental recognition of the international crimes committed against comfort women, (4) official compensation from the state budget drafted based on a special legislation, (5) construction of monuments, (6) the correction of Japanese history textbooks to expose the truth about comfort women and (7) identification and prosecution under Japanese law of all perpetrators involved in military sexual slavery. These demands were summarized by the Special Rapporteur Coomaraswamy in her 1996 report.

In contrast to the avid effort to exhaust local remedies by Korean comfort women and their activists, Indonesian comfort women, as well as their representatives, have not filed any civil lawsuits or criminal complaints against Japan owing to a lack of knowledge and due to the reticence of the Indonesian government to facilitate the legal process. This is proved by the non-existence of proceedings records between former Indonesian comfort women and the Japanese government before any Japanese domestic courts.

3.6.National Regulations Regarding Diplomatic Protection

The Korean government appears to be more proactive in protecting the rights of former comfort women through national legislations. The most fundamental provision is Article 2 Section 2 of the Constitution of the Republic of Korea which, through further interpretation, grants the right to receive protection to its citizens. The provision itself does not literally confer the duty of the state to perform diplomatic protection. However, in the case of Korean comfort women, it may create legal obligation for Korea to perform diplomatic protection, either through

¹³⁹ Hwang Geum Joo v. Japan, 172 F. Supp. 2d 52 (D.C. Cir. 2001).

diplomatic channels or judicial proceedings, as instructed by the Constitutional Court of Korea in the case of the comfort women constitutional complaint concluded in 2011.

As the first step to implement Article 2 Section 2 of the constitution, On 8 October of 2008, the Parliament of Republic Korea issued a resolution in order to press the government of Japan to take responsibility for the crimes conducted against the former Korean comfort women. The resolution has three points of demand as follows:

- The parliament demands that the Japanese government officially present a full apology to the former Korean comfort women as they were sexually enslaved by the Japanese imperial soldiers since 1930s until the end of World War II.
- The parliament demands first that the Japanese government admit that the comfort women system was a crime against humanity and second that it provide adequate and effective compensation to the comfort women by decisive action, such as having the Japanese Diet establish related regulations.
- The government of the Republic of Korea should ensure that the Japanese government officially apologizes, provides compensation to the victims and allows for the teaching of facts in Japanese history textbooks as a manifestation of Japan's willingness to accept the recommendation by the United Nations Commission on Human Rights and the CEDAW Committee.

Due to the uncertainty when waiting for the adequate and effective compensation from the Japanese government, the government of Korea also used its own national budget in an effort to redress the former comfort women financially. This policy was implemented through the “Act on the Support of Livelihood Stability for the Former Comfort Women Drafted into the Japanese Forces under Japanese Colonial Rule.” Based on this regulation, the Korean government provides support for living expenses in a lump sum and on a monthly basis to the former comfort women.

In the case of Indonesia, there was no specific national legislations which aimed to protect and enforce the rights of the former comfort women. The only relevant legislation is the provision of Article 18 of the Indonesian Foreign Relations Act (Law No. 37/1999), which confers the duty to the Indonesian government to protect Indonesian nationals, both natural and legal persons, who faces difficult situations in foreign states overseas.¹⁴⁰ This may imply the duty of the state to perform diplomatic protection of its citizens.

However, following the peace treaty between Japan and Indonesia, and despite the testimony of the former Indonesian comfort women, no single instance of legislation was enacted to redress the injuries and enforce the rights of the women. Even after the acceptance of the AWF's fund in 1996, not even any single regulation was established in order to distribute the funds to the individual comfort women.

3.7.Domestic Measures to Enforce Human Rights

Due to the uncertainty of the comfort women issue settlement with Japan, the Korean government enacted the “Act on Operation and Management of Claim Fund” on February 19, 1966 (repealed by Law No.3613 on December 31, 1982) following the reception of three hundred million US dollars from Japan in a non-payable grant which was based on the 1965 Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan. However, the beneficiaries of the grant were limited to deceased victims who had been forced against their will to become sexual slave by Japan. The government enacted the “Act on the Support of Livelihood Stability for the Former Comfort Women Drafted into the Japanese Forces under Japanese Colonial Rule.” Based on this regulation, the Korean government provided support for living expenses in a lump sum on a monthly basis to the former Korean comfort women by

¹⁴⁰ Law Number 37 of 1999 on Foreign Relations (The State Gazette of the Republic of Indonesia No. 156 of 1999).

using its national budget. This also included priority rental for housing, living allowances and medical aid and nursing.

The Korean comfort women were not satisfied with this measure and still felt that their fundamental rights were infringed upon the government's non-exercise of diplomatic protection. Therefore, the women filed a constitutional complaint with the Constitutional Court of Korea. The substance of the complaint is that the Korean government had failed to resolve their damage claim problem against Japan through diplomatic channels or arbitration under Article 3 of the Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan signed in June 22, 1965 (hereinafter the agreement).¹⁴¹ This was due to the dispute between Japan and Korea over the interpretation of whether the rights of the comfort women to claim damages against Japan had been extinguished by Article 2 Section 1 of the Agreement.¹⁴² Japan refused to provide them with compensation on the grounds that the claims had been quenched by the aforementioned provision, while the Korean government denied that the comfort women claims issue had been settled by the agreement. This omission to act by the Korean government was alleged to infringe on the comfort women's fundamental right under Article 2 Section 2¹⁴³ regarding the right to receive

¹⁴¹ Article 3 Section 1 of the agreement states, "Any dispute between the Contracting Parties concerning the interpretation and implementation of the present Agreement shall be settled, first of all, through diplomatic channels." Article 3 Section 2 then states, "Any dispute which fails to be settled under the provision of paragraph 1 shall be referred for decision to an arbitration board composed of three arbitrators..."

¹⁴² Article 2 Section 1 of the agreement states "The Contracting Parties confirm that the problem concerning property, rights and interests of two Contracting Parties and their nationals (including juridical persons) and concerning claims between the Contracting Parties and their nationals, including those provided for in Article IV, paragraph (a) of the Treaty of Peace with Japan signed at the city of San Francisco on September 8, 1951, is settled completely and finally."

¹⁴³ Article 2 Section 2 of The Constitution of The Republic of Korea states, "It shall be the duty of the State to protect citizens residing abroad as prescribed by Act."

protection and Article 10¹⁴⁴ of the Constitution of the Republic of Korea (hereinafter the Korean Constitution) and is therefore unconstitutional.¹⁴⁵

The Korean government, positioned as the respondent facing the complaint, stated that it had made its best effort to settle the comfort women issue by raising this issue continuously in the international community. The government was focused on the more important issue of calling on the Japanese government to conduct thorough fact-finding about the crimes, to deliver a formal apology and undertake reflection and to introduce the issue through proper history education of the Japanese young generations.¹⁴⁶

The government stated that the decision to postpone pursuing further settlement, which was perceived by the claimant as an omission, constituted a legitimate exercise of diplomatic discretion broadly enjoyed by the Korean government. Moreover, the government perceived that the pursuance of demanding that Japan accepts its legal responsibility had not resulted in a certain outcome. Thus, the government decided not to hold the government of Japan financially accountable. Instead, the government claimed that it had made its best effort to provide the victims with financial assistance and compensation by itself.¹⁴⁷

As the first step in examining this case, the constitutional court adduced that the point of the case is whether the Korean government has the obligation to take diplomatic efforts or the like under the Article 3 of the Agreement. Then, the court had to answer the question whether the Korean government action or inaction in this case had infringed on the comfort women's fundamental right of protection under the constitution.

¹⁴⁴ Article 10 of The Constitution of The Republic of Korea stipulated, "All citizens shall be assured of human dignity and worth and have the right to pursue happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individual.

¹⁴⁵ Challenge against the Act of Omission Involving Article 3 of "Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan, 23-2(A) KCCR 366, 2006Hun-Ma788 (KCCR, August 30, 2011) at 121-145.

¹⁴⁶ Ibid., at 142.

¹⁴⁷ Ibid., at 149-150.

The constitutional court responded to the Korean government's argument, stating that the non-exercise of governmental power in the case of comfort women refers to the duty to use the dispute settlement procedures in Article 3 of the Agreement, in order to seek a clear interpretation of whether the damages are still valid to be claimed. This mechanism should be enforced by the government because Japan still believes that the agreement extinguished the damages claim, which in fact it did not. The diplomatic action that the government claimed had been exhausted, through raising the issue in international community, was proved to be insufficient for the victims' and the damage claims were still ignored.¹⁴⁸

In addition, the willingness of Japan as a delinquent state in the comfort women case to admit its guilt and taking responsibility would be the most effective solution to restore the human worth and dignity of the complainants stipulated in Article 10 of the Korean constitution, rather than the government's provision of financial support to the victims. Thus, the duty of the Korean government to act according to the constitution was not accomplished merely by offering some livelihood support to the women.¹⁴⁹

The court recognised that the Korean government enjoyed wide discretion in the domain of diplomacy, thus it was wholly up to the government to exercise or not to exercise diplomatic protection of the comfort women. However, the rights of the women are guaranteed under the constitution and are binding with regard to all state powers. The domain of diplomacy is an aspect of executive power, which is not exempted from the binding force of the constitution. Consequently, it could not be excluded from those subject to judicial review. As a result, failure to fulfil the duty of taking diplomatic actions which heavily intertwined with the people's fundamental rights, construed a clear violation of the constitutional duty to protect

¹⁴⁸ Ibid., at 142.

¹⁴⁹ Ibid.

fundamental rights. It should be declared as an act of fundamental rights infringement and is therefore unconstitutional.¹⁵⁰

In order to avoid this infringement, the discretion of the government should be restricted to the reasonable scope, which must be consistent with the binding force of fundamental rights on government power. This means that the discretion must be exercised by taking into account the significance of violated rights, the level of urgency, and possibility of providing a legal remedy and whether the act will be consistent with the national interests of the state.¹⁵¹

Pertaining to the significance of the violated rights, the constitutional court agreed with the opinion of international jurists, that the crimes of sexual slavery by the Japanese military constituted a crime against humanity, which is undeniably identified as a grave violation of human rights. The comfort women victims' right to claim damages from the government of Japan is not simply an aspect of property rights enshrined under the constitution, but also relates to the post-facto restoration of dignity, value and personal liberty that was and has been continuously violated. Therefore blocking the repayment of damage claims, is not simply infringing on property rights, but also infringing on the fundamental dignity and value of human beings.¹⁵²

The court argued that the need of legal remedy is urgent because although local remedies had been exhausted, almost none of them led to actual redress. It was already over 60 years since the end of the World War II, when the crime was committed against these women, and claims to the domestic courts of Japan did not bring any satisfying results. Moreover, the advancing age of the survivors and the fact that the number of living survivors is gradually being reduced made redress more urgent.¹⁵³

¹⁵⁰ Ibid., at 147.

¹⁵¹ Ibid.

¹⁵² Ibid., at 148-149.

¹⁵³ Ibid., at 149.

The court is aware that it is difficult to impose a duty of action on the Korean government if there is absolutely no chance of providing a legal remedy to the complainants. However, a duty of action is not only required when a legal remedy is clearly guaranteed, but also when the possibility of obtaining one exists. In this case, the possibility to claim damages against the Japanese government existed, hence, Korean government should consider the victims' requests. This is in line with recommended practice stipulated in Article 19 of the Draft Articles on Diplomatic Protection adopted by the International Law Commission in 2006 which states that the state must listen to an injured national's opinion whether or not to exercise diplomatic protection.¹⁵⁴

The Korean government argued that its reason for restraint with regard to invoking Japanese legal responsibility was the fear of a destructive legal dispute or strained diplomatic relations with Japan. This was perceived by the Korean government as a threat to national interests. In contrast, the constitutional court rebutted that argument by stating that destructive disputes and severances of diplomatic relations were not qualified as proportional reasons to disregard legal remedies for complainants who are facing serious basic rights violations. Moreover, it neither constitutes a national interest to be considered seriously. Instead, the settlement of this issue would be more constructive to the future amicable relationship between Korea and Japan because all of the denial of historical facts and misunderstandings between the two states could be corrected. Thus, the mutual understanding and trust between the countries and their peoples could be deepened and the action could prevent the similar tragedies by learning from the past.¹⁵⁵

Eventually, the court concluded that the Korean government's omission in the comfort women case violates the constitution and the fundamental rights of these women as enshrined in Article 2 Section 2 and Article 10 of the Korean constitution.

¹⁵⁴ Ibid., at 150.

¹⁵⁵ Ibid., at 151.

The court also added a sub-conclusion that the Korean government did not have the discretion to not take action and that all the efforts claimed to be taken by the government are not sufficient to be deemed that it fulfilled its duty of action to uptake a dispute settlement procedure against Japan under Article 3 of the Agreement.¹⁵⁶

Following the decision, the Korean Constitutional Court exhorted the Korean government to take the following concrete actions:

1. fulfilling its duty of action to undertake dispute settlement procedures against Japan under Article 3 of the Agreement;¹⁵⁷ and
2. resolving the sexual slavery issue by the Japanese military at the interstate level with the utmost effort.¹⁵⁸

The court wrapped the above-mentioned recommendation with the recognition that its execution can only be entrusted to political power. The court could not force the Korean government to push the bounds of the constitution, laws, and constitutional interpretations either to implement the recommendation. This is the constitutional boundary that must be adhered to by the constitutional court under the principle of separation of powers.¹⁵⁹

While the Republic of Korea was successful in controlling governmental discretion in the field of diplomatic protection through a judicial review by the constitutional court, the Indonesian government did not exercise any measures to support the comfort women there since the acceptance of the AWF's fund in 1996. Indonesian comfort women also could not file a protest against the Indonesian government regarding to its omission due to the lack of availability of a constitutional complaint mechanism in the Indonesian legal system. This vacancy of law has made legal remedy an unsolved issue until now.

¹⁵⁶ Ibid., at 150-152.

¹⁵⁷ Ibid., at 161-162.

¹⁵⁸ Ibid., at 163.

¹⁵⁹ Ibid.

3.8.Diplomatic Protection

The Korean Constitutional Court decision was most likely the reason why the Korean government decided to hold high-level consultations with the Japanese government from February of 2015 to December of 2015. The result of the eight rounds of consultation in total was a bilateral agreement with Japan concluded on December 28, 2015 (hereinafter the 2015 Japan-Korea bilateral agreement). The agreement has six elements of content consisting of the followings:

1. The Japanese government's responsibility

The issue of comfort women was a matter involving the Japanese military authorities, that severely injured the honour and dignity of many women. In this regard, the government of Japan painfully acknowledges its responsibility.¹⁶⁰

2. Apologies by the Japanese government

Prime Minister of Japan expressed anew sincere apologies and remorse from the bottom of his heart to all those who suffered immeasurable pain and incurable physical and psychological wounds as comfort women.¹⁶¹

3. Monetary measures by the Japanese government

The government of Japan will take measures with its own budget to heal the psychological wounds of all former comfort women. More specifically, the government of the Republic of Korea will establish a foundation for the purpose of providing assistance to the former comfort women. The government of Japan will contribute from its budget a lump sum of fund to this foundation. The governments of Korea and Japan will cooperate to implement programs to restore the honour and dignity and to heal the psychological wounds of all former comfort women.¹⁶²

¹⁶⁰ The Government of Republic Korea, Ministry of Foreign Affairs, Task Force on the Review of the Korea-Japan Agreement on the Issue of "Comfort Women" Victims, *Report on the Review of the Korea-Japan Agreement of December 2015 on the Issue of "Comfort Women" Victims* (December 27, 2017), 10.

¹⁶¹ Ibid., 11.

¹⁶² Ibid., 12.

4. Final and irreversible resolution

The issue of comfort women will be finally and irreversibly resolved on the condition that the above-mentioned measures are faithfully implemented.¹⁶³

5. Memorial statues in front of the Japanese embassy in Korea and overseas

This was a non-disclosed element. From the early phase of the consultations, the Japanese government demanded to relocate the memorial statues in front of Japanese embassy in Seoul and overseas. Japan also hoped Korea would persuade the concerned groups who initiated the erection of the statues.

6. Refrain from reprobation and criticism in international forums

This was also a non-disclosed agreement in which Korea will refrain from reprobation and criticism in international forums, if Japan implements the measures promised by its government faithfully.

The bilateral agreement between Korea and Japan did not receive a positive response from the international community. For instance, the CEDAW committee through its Universal Periodic Review of Japan in 2016 (seventh and eight sessions) criticized the Japanese government's attitude following the bilateral agreement with the Republic Korea and expressed regret with regard to certain points:¹⁶⁴

1. that the announcement of the bilateral agreement with Republic of Korea did not fully adopt a victim-centered approach;
2. that some of the victims have died without obtaining unequivocal recognition of the state responsibility for the serious human rights violations they suffered;
3. that Japan has not admitted its obligation under international human rights law towards comfort women in other countries; and
4. that Japan still persists in deleting references to the comfort women issue in school textbooks.

¹⁶³ Ibid., 14.

¹⁶⁴ United Nations, Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Seventh and Eight Periodic Reports of Japan*, CEDAW/C/JPN/CO/7-8 (March 10, 2016), 8-9.

Based on the findings above, the CEDAW Committee recommended that Japan execute the following measures:¹⁶⁵

1. recognise the right of victims to a remedy and accordingly provide full and effective redress and reparations, including compensation, satisfaction, official apologies and rehabilitation services;
2. take into consideration the views of victims when implementing the bilateral agreement announced in December of 2015 and ensure their rights to truth, justice and reparation;
3. integrate the issue of the comfort women in school textbooks and ensure that the historical facts are objectively presented to students and the public;
4. inform concerned parties as to whether the afore-mentioned measures have been implemented in the next periodic reports.

Not only the Japanese government, but also the Korean government, as the victims' national state, could not escape from the CEDAW Committee's criticism of its policy through the 2015 bilateral agreement. On the occasion of the eighth Universal Periodic Review of the Republic of Korea, the committee stated that the effort did not employ a victim-centered approach because there was clear opposition of victims/survivors and their families to the establishment of the Reconciliation and Healing Foundation. Therefore, it recommended that the Republic of Korea ensure that the views of the victims or survivors and their families be taken into consideration when implementing the bilateral agreement. It also obliges them to ensure that the victims, survivors and their families' rights are fully upheld through rehabilitation and to provide prompt and adequate compensation without delay.¹⁶⁶

All of the criticism towards the 2015 Japan-Korea bilateral agreement was rooted in the review report of the agreement conducted by a task force established by the Ministry of Foreign Affairs of Korea during the President Moon Jae In

¹⁶⁵ Ibid.

¹⁶⁶ United Nations, Committee on the Elimination of Discrimination against Women, CEDAW/C/KOR/CO/8 (March 14, 2018), 8-9.

administration. The members of the task force were inaugurated on July 31, 2017. The aim of the task force was to assess the content of the 2015 Japan-Korea bilateral agreement. Among the objects of assessment, the substance and structure of the agreement, as well as a victim-centered resolution were legally significant to measure whether the agreement constituted a proper and effective form of diplomatic protection for the former Korean Comfort women.¹⁶⁷

First, the task force commented on the elements of disclosed agreement which are explained as follows:

1. On the acknowledgement of responsibility, a redaction of the words which Japan used, “painfully acknowledges its responsibility,” is sought. These only imply moral responsibility, instead of legal responsibility, which is unacceptable for the Korean public.¹⁶⁸
2. The apologies made by the Japanese government were not implemented in the form of a cabinet resolution, which is irreversible and has higher formality, even after the agreement content was released to the public. This did not accord with what victims and pressure groups have been demanding continually.¹⁶⁹
3. After the announcement of the agreement, the Japanese government stated that the nature of the monetary funds allocated to the Reconciliation and Healing Foundation is not reparation based on any legal responsibility. The victims and activists could not accept this statement. Unless the legal responsibility issue is completely resolved, monetary funds promised by Japan will mean nothing.¹⁷⁰
4. The usage of “final and irreversible resolution” in the agreement became controversial in Korea after the agreement was announced. The task force found that the Korean government intended that the Japanese Prime Minister’s formal apology be backed by a cabinet decision to guarantee the irreversibility of the

¹⁶⁷ Task Force, *Report on the Review*, 1-3.

¹⁶⁸ Ibid., 10.

¹⁶⁹ Ibid., 11-12.

¹⁷⁰ Ibid., 13.

apology. However, Japan does not interpret the phrase similarly to how Korea does.¹⁷¹

Second, the task force regretted that in the structure of the agreements, there were indeed non-disclosed elements which were agreed upon by the parties. The non-disclosed parts contained sensitive issues, particularly for the Korean public, such as the request from Japan to persuade pressure groups such as the Korean Council not to raise their voices in international forums, the measure regarding memorial statues in front of the Embassy of Japan in Korea and other countries and the request to stop using the term “sexual slavery.”¹⁷²

From the beginning of the negotiations, the task force discovered that the Korean government did not confirm the existence of the non-disclosed agreements to the public and accepted Japan’s request to keep these secret. The Korean government agreed to the request of persuading pressure groups and promised to use the term “issue of the comfort women victims of the Japanese military” to replace the term “sexual slavery.” Whereas the request to remove the memorial statues was rejected on the basis that it was not involved in setting up the monuments, it still accorded to refrain from supporting such efforts. The existence of these non-disclosed elements shows that the bilateral agreement was government-centered and not victim or people-centered.¹⁷³

Thirdly, the task force regretted that the nature of the agreement was not a treaty but a political agreement. Both governments of the states verbally confirmed at the meeting of foreign ministers the content of the agreement and announced it at a joint press conference thereafter. The announcements were separately posted by both side on their respective official website. However, what Japan posted was discordant relative to what Korea posted with regard to words redaction issue. These facts triggered suspicions and controversies regarding what was agreed upon in reality and

¹⁷¹ Ibid., 14.

¹⁷² Ibid., 19-20.

¹⁷³ Ibid.

caused many to wonder whether the publication included all aspects of the agreements.¹⁷⁴ The binding force of the agreement under international law is also uncertain because it was unwritten and informal.

The Korean government during the Park Geun Hye administration initially did not deny that the victim-centered resolution must be applied to solve the problem. A victim-centered approach means that remedies and reparations should be made in accordance with the victims at the center. The task force argued that Ministry of Foreign Affairs was initially in accord with this principle in that they contacted the victims and the pressure groups on more than fifteen occasions in order to record their demands. The Korean victims have repeatedly stated that they have three key demands to the Japanese government. They are the acknowledgement of responsibility, an official apology and individual compensation. These three demands were more important than anything else to be included in the international agreement in resolving the comfort women issue. Unless these demands are fulfilled, the issue will revert to where it started, even if the two governments seemingly reach an agreement.¹⁷⁵

However, the Korean Ministry of foreign affair failed to implement a victim-centered resolution when initiating the bilateral agreement with Japan. During the negotiation process, Korean government through Ministry of Foreign Affairs explained to the victims what was being negotiated. Nevertheless, it did not inform the victims that there were measures that bound Korea, such as the confirmation of the final and irreversible resolution, as well as refraining from criticism in international forums. The Ministry of Foreign Affairs also failed to comprehend the victims' views regarding the form and the amount of reparations. As a result, the demands of the victims were not in accord with the content of the bilateral agreement.¹⁷⁶

¹⁷⁴ Ibid., 21.

¹⁷⁵ Ibid., 21-22.

¹⁷⁶ Ibid.

Without disregarding the commentary of the governments and the United Nations, the assessment as to whether the 2015 Japan-Korea bilateral agreement could be addressed as a form of diplomatic protection, should be analysed in the light of the legal definition of diplomatic protection provided by the ILC Draft Articles on Diplomatic Protection 2006. Draft Article 1 defines diplomatic protection as the invocation by a state, through diplomatic action or other means of peaceful settlement, of the responsibility of another state for an injury caused by an internationally wrongful act of that state to a natural or legal person that is a national of the former state with a view to the implementation of such responsibility.¹⁷⁷ From the definition provided, it can be concluded that several requirements exist for an action to be categorized as diplomatic protection. They are:

1. The object of invocation must be the responsibility of another state regarding an injury caused by an internationally wrongful act or what is prevalently addressed as international legal responsibility. Thus, an invocation of moral responsibility is not included.
2. Invocation should be done through diplomatic action or other means of peaceful settlement.

The 2015 Japan-Korea bilateral agreement fulfilled the second requirement given that it was constituted a peaceful settlement in the form of bilateral negotiation between the Republic of Korea as the state of nationality and Japan as the delinquent state who is liable for the crime against the Korean comfort women. However, whether the negotiation fulfilled the first requirement must be assessed further.

The term “invocation” in Draft Article 1 should be interpreted in conjunction with Draft Article 42 on State Responsibility 2001. Invocation for the purposes of this article should constitute a measure with a relatively formal character, for example, the raising or presentation of a claim against another state or the commencement of proceedings before an international court or tribunal. A state does not invoke the

¹⁷⁷ Texts available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_8_2006.pdf.

responsibility of another state merely because it delivers criticism to that state for a breach and urges the conformity with regard to an obligation or even reserves its rights or protests. A plain protest against a breach of international law by another state or reminding it of its international responsibilities with reference to a treaty is not an invocation of responsibility. Such informal diplomatic contacts do not amount to an invocation of responsibility unless they involve specific claims by the state concerned, such as a demand for compensation as the consequence of the breach, or a specific action such as the filing of an application before a competent international tribunal or even the taking of countermeasures.¹⁷⁸ The scope of responsibility invoked must be based on the breach of international law or must possess a legal characteristic. Invoking moral responsibility without explicitly pointing out the violated international legal basis does not amount to “invocation” according to Draft Article 1 on Diplomatic Protection and Draft Article 42 on State Responsibility.

The legal definition explained in the previous paragraph must be utilized to assess all of the elements of the 2015 Japan-Korea bilateral agreement. First, the assessment should be based on the negotiation process when concluding the agreement. It should be verified as to whether the Korean government intended or had explicitly expressed itself to invoke the legal responsibility of Japan during the process of consultation and negotiation between the two states. This can only be revealed by examining the minutes or treatises of the negotiation. However, the real intent of the Korean government has remained unknown thus far, as those resources are not available to the public.

Although draft articles on diplomatic protection permit the invocation of responsibility through diplomatic channels, the process of negotiation appears to be lacking legal formalities based on Draft Article 42 on State Responsibility 2001 because during the negotiation process, the direction of invoking legal responsibility, such as presentation of comfort women claims was not envisaged and no plan to

¹⁷⁸ Commentary of Draft Article 42 on State Responsibility 2001, para. (2).

elevate the proceeding to an application before a competent tribunal or even a plan of countermeasures to resolve the injuries was created. Thus, unless it was clear that the real intent of the Korean government is to invoke the legal responsibility of Japan, the negotiation process of the 2015 Japan-Korea bilateral agreement could not be deemed an attempt at diplomatic protection.¹⁷⁹

The next step is to assess the outcome of the negotiation. Although the comfort women bilateral agreement does not qualify as a formal treaty, if Japan and Korea intended the agreement to have legal binding force, that force will be attached to the agreement. The most important factor to form this type of binding force is the intention of the parties to establish an international legal obligation to the agreement. This intention can be inferred from the operative wordings of the agreement and from other circumstances influencing the agreement.¹⁸⁰ Usually, the wordings of legal obligation will involve operative words such as “should,” “oblige” or “must.” However, such norm identifiers do not appear in the purported text of the 2015 Japan-Korea bilateral agreement published on the websites of both governments. There is no explicit provision regulating legal responsibility and/or consequences from non-performance of an obligation in the text either.¹⁸¹ In contrast, the text only declared that Japan “painfully acknowledges its responsibility,” which merely indicates the recognition of moral responsibility. There is also no establishment of formal proceeding to resolve the compensation issue. Thus, the agreement text did not express any intention of either government to establish an instance of legal binding force. Consequently, it only fell within the ambit of political agreement, rather than being an international legal agreement between the two countries. Since it is not a legal agreement, it failed to fulfil the definition of the invocation of

¹⁷⁹ Jae Min Choung, “The Relationship between the Decision of the Constitutional Court of Korea and the Intergovernmental Agreement with Respect to the ‘Comfort Women’ Issue,” *The Korean Journal of International Law*, Vol. 61, No.1 (2016): 214-215.

¹⁸⁰ Anthony Aust, *Modern Treaty Law and Practice* (New York: Cambridge University Press, 2007), 19.

¹⁸¹ Choung, “The Relationship,” 213.

responsibility, which is required to satisfy the legal requirement of diplomatic protection. This failure resulted in the conclusion that the 2015 Japan-Korea bilateral agreement does not constitute any action equivalent to diplomatic protection.

If the assessment of the negotiation process and the result is combined, two probabilities can be assumed from the circumstances of the 2015 Japan-Korea bilateral agreement. First, the Korean government's actual intent during the negotiation process was not to invoke the legal responsibility of Japan, resulting in non-acknowledgement of the said responsibility. Second and alternatively, the Korean government indeed intended to invoke the legal responsibility of Japan, but they failed to persuade Japan to admit any legal responsibility, resulting in the mere admittance of moral responsibility. Thus, from the point of view of the Korean government, two conclusions can be extracted. First, there may have been no diplomatic protection attempt from the beginning of the negotiation process. Second, by judging from the result, there may have been an attempt, but failed and thus it was reflected in the agreement.

The 2015 Japan-Korea bilateral agreement could not be addressed as diplomatic protection because it is only a political agreement. However, it indeed constituted a measure to respond to the Korean constitutional court decision rendered on August 30, 2011, which has a binding force on the executive organ, particularly in restricting its discretionary power. Following the court ruling, President Lee Myung Bak's administration requested bilateral consultations with Japan twice, in September and in November of 2011, but did not receive a response. In December of 2011, President Lee Myung Bak rejected the humanitarian solution proposed by Japan, known as the Sasae Proposal, since it did not include acknowledgement of state responsibility. The effort to implement the court decision was passed down to the Park Geun Hye administration and starting in February of 2013, she adopted a policy of persuading Japan to hold working-level consultations. This pursuit led to the negotiations which took place in 2015, following the conclusion of the 2015 Japan-Korea bilateral

agreement. The Korean government itself, through the Report on the Review of the bilateral agreement published on December 27, 2017, confirmed that the driving force behind these sequences of events was the government willingness to implement the constitutional court decision.¹⁸²

Presumably, the 2015 Japan-Korea bilateral agreement should have been a proper diplomatic protection attempt in accordance with the legal definition provided in the ILC Draft Articles on Diplomatic Protection 2006, had it been executed properly with the sole purpose of invoking the legal responsibility of Japan. Despite the massive criticism received by the government regarding this agreement, the international community actually appreciates the efforts of the Republic of Korea to open a diplomatic channel and discuss the issue face to face with Japan. Although it still has issues with a victim-centered resolution and the admittance of legal responsibility, the efforts of the Korean government are still worthwhile since they were better than a refusal to do anything as in Indonesian case.

The relationship between Indonesia and Japan after World War II was completely different from that between Korea and Japan. Instead of an economically competitive relationship, as observed between Korea and Japan, Indonesia and Japan has an interdependent relationship. During the cold war, the United States and Japan become allies. Indonesia took the side of the US and Japan under president Soeharto's New Order Regime. Indonesia welcomed Japan as one of the largest contributors of financial aid and an investment to the country. Citizens strongly opposed Japan's investment plan in Indonesia, even staging the *Malari* riot in Jakarta, considering that the citizens still held sentiments towards the Japanese occupation of Indonesia. Nevertheless, the protests and riots were repressed by the Indonesian military under the command of President Soeharto.¹⁸³ This indicates that the

¹⁸² Task Force, Report on the Review, 6.

¹⁸³ M. Bahri, "International aid for development? An overview of Japanese ODA to Indonesia", *Makara Seri Sosial Humaniora* 8(1) (2004): 42-43.

government prioritized the help offered by the Japanese government for the sake of Indonesian economic development and thus chose to ignore the past.

It was understandable that forgetting the past for the sake of amicable diplomatic relations between the two countries was a part of the Indonesian government's foreign policy. However, due to Indonesia's strong dependency on Japan in order to develop its economy, the comfort women issue appeared to be forgotten. The government chose to set aside the issue considering the large economic influence of Japan on Indonesia. If the comfort women issue was passed on to the negotiating table, a considerable loss leading to the severance of diplomatic relations with Japan could occur.

It must be noted that there are ways other than an interstate agreements mechanism to demand reparations and compensations. These include unilateral declarations by responsible states or demands from the victims themselves. Seeing that counting on the government to initiate an interstate agreement with Japan would be in vain, Indonesian comfort women activists have voiced their demands for reparations and compensations directly to Japan through international forums. The movement has existed since 1993. However, with regard to international human rights violations in Asia, the most effective choice of methods to settle the problem is still dominated by the interstate mechanism. It is uncertain when the Indonesian comfort women and activists will use this method to pursue Japan to acknowledge its legal responsibility. The willingness of the Indonesian government to initiate the interstate mechanism is desperately needed for complete settlement of this issue.

3.9.Overall Comparison between the Republic of Korea and the Republic of Indonesia

Overall comparisons between Korea and Indonesia in the case of diplomatic protection of former comfort women are concluded in the following table.

Table 1: Comparison between the Republic of Korea and the Republic of Indonesia Regarding Former Comfort Women Diplomatic Protection

Scope	Republic of Korea	Indonesia
Existence of activism	Activism is strong in terms of sufficient governmental support, strong structure of organisations and obvious activities in both national and international field.	Activism is weak in terms of zero governmental support, unstructured organisations which led to dissolutions of some groups and lack of obvious activities both in national and international level.
Response to AWF	Rejected the fund	Received the fund
Exhaustion of local Remedies	<ol style="list-style-type: none"> 1.Lawsuit against Japan initiated by Kim Hak Sun on December of 1991 2.Lawsuit filed by four former comfort women in 1993 at Shimonoseki branch of the Yamaguchi District Court 3.Criminal complaints to the Tokyo District Public Prosecutors Office filed by twenty-seven survivors represented by the Korean Council on February 6, 1994 4.Appeal of a former Korean comfort woman rejected by Japanese High Court of Justice on November 30, 2000 5.Class action suit filed by fifteen former Korean comfort women filed in the Washington District Court 	None
National regulations	<ol style="list-style-type: none"> 1. Article 2 Section 2 of the Constitution of the Republic of Korea 2. Republic of Korea's Parliament resolution dated October 8, 2008 	None

	3. Act on the Support of Livelihood Stability for the Former Comfort Women Drafted into the Japanese Forces under Japanese Colonial Rule	
Domestic measures	Constitutional Court Decision on Challenge against the Act of Omission Involving Article 3 of “Agreement on the Settlement of Problem concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan” No. 23-2(A) KCCR 366, 2006Hun-Ma788 dated 30 August 2011	None
Diplomatic protection or any attempts that could have constituted diplomatic protection	1. Petition submitted through UNCHR on March 4, 1992 in order to invoke Japan to investigate the crime against comfort women 2. The 2015 Korea-Japan bilateral agreement	None

It is concluded through the table above that the government of the Republic of Korea provided better diplomatic protection to its former comfort women than the Indonesian government. This was caused by many factors, mainly differences in the legal and political position of the two states. This section will analyse those differences.

Some legal factors influenced the difference between Indonesian and Korean government in considering the merit of undertaking diplomatic protection of the comfort women. The first legal reason was different views of the two governments in interpreting their respective peace treaty with Japan. The Republic of Korea perceived that the comfort women issue were not settled by their peace treaty and it

is in opposition to the Japanese persistent interpretation that the issue had been resolved by the agreement. In contrast, the Indonesian government accords with the Japanese view that their peace treaty resolved the issue of all individual injuries during World War II and supposedly included the comfort women damage claims. The government perceived that the comfort women and activists supposed to present this issue immediately after the treaty was concluded. However, when the victims finally came out and testified about the crime, the government said that it was too late to file a claim as the fund had been used up immediately for other damage claims. Thus, the Indonesian government decided that the best way to solve this problem is through the acceptance of AWF's fund. It is shown from this fact that Indonesian government did not understand that the comfort women issue is a serious international human rights issue and the claim arising from the issue should be available to be presented anytime, regardless the treaty provisions or any statute of limitations.

The second legal reason is that there are some significant differences between peace treaties concluded between Japan and the two states respectively. In order to obtain a better comparison of the peace treaty between Japan and the two states respectively, the following table will point out the significant difference.

Table 2: Differences between Japan-Korea Peace Treaty 1965 and Japan-Indonesia Peace Treaty 1958

Points of Comparison	1965 Japan-Korea Treaty	1958 Japan-Indonesia Treaty
Official name of the treaty	Japan and the Republic of Korea Agreement on the settlement of problems concerning property and claims and on economic co-operation, Signed at Tokyo, on June 22, 1965 ¹⁸⁴	Treaty of Peace between Japan and the Republic of Indonesia, Signed at Djakarta January 20, 1958 ¹⁸⁵
Reparation clause	<p>Article I regulates the amount of reparation.</p> <p>The contracting parties confirm that the problem concerning property, rights and interests of the two contracting parties and their nationals (including juridical persons) and concerning claims between the contracting parties and their nationals including those provided for in Article IV, Paragraph (a) of the treaty of peace with Japan signed in the city of San Francisco on September 8, 1951 is settled completely and finally (Article II Paragraph 1).</p> <p>It is agreed that “property, rights and interests” means all kinds of substantial rights which are recognized under law to be of property value (Agreed Minutes to The Agreement Paragraph 1).</p>	Japan is prepared to pay reparations to the Republic of Indonesia in order to compensate the damage and suffering caused by Japan during the war (Article 4 Paragraph 1).
Waiver clause	The High Contracting Parties confirm that the problems	The Republic of Indonesia waives all reparations claims

¹⁸⁴ “Japan and Republic of Korea Agreement on the settlement of problems concerning property and claims and on economic co-operation,” signature June 22, 1965, *United Nation Treaty Series*, Vol. 583, No. 8473 (1966): 219, <https://treaties.un.org/doc/Publication/UNTS/Volume%20583/volume-583-I-8473-English.pdf>.

¹⁸⁵ “Japan and Indonesia Treaty of Peace,” signature January 20, 1958, *United Nations Treaty Series*, No.4688 (1959): 228, <https://treaties.un.org/doc/Publication/UNTS/Volume%20324/v324.pdf>.

	concerning the property, rights, and interests of the two signatories and their nationals (including juridical persons) and the claims right between the High Contracting Parties and between their nationals...have been settled completely and finally (Article 2 Paragraph 1).	of the Republic of Indonesia and all other claims of the Republic of Indonesia and its nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war (Article 4 Paragraph 2).
Dispute settlement clause	Any dispute between the contracting parties concerning the interpretation and implementation of the present agreement shall be settled, first of all, through diplomatic channels (Article III Paragraph 1). Any dispute which fails to be settled under the provision of Paragraph 1 shall be referred for decision to an arbitration board (Article III Paragraph 2).	Any dispute arising out of the interpretation or application of this treaty shall be settled in the first instance by negotiation, and if no settlement is reached within a period of six months from the commencement of negotiations, the dispute shall, at the request of either contracting party, be referred for decision to the International Court of Justice (Article 6).
Registration status	Registered to UN by Japan on December 15, 1966	Registered by Japan on March 2, 1959

The table shows that the reparation clause in Japan-Korea treaty only covers “substantial rights which are recognized under the law to be of property value”, while Japan-Indonesia treaty’s reparation clause covers all “the damage and suffering caused by Japan during the war.” It means that according to literal interpretation, what is covered for reparation in the Japan-Indonesia treaty is wider than what is covered in the Japan-Korea treaty. The Japan-Korea treaty specified that the rights must be recognized to be of “property value,” which hinders the literal interpretation to cover the comfort women claim since it includes intangible psychological damages suffered. In short, the probability to interpret the clause inapplicable to fit into the case of comfort women still exists if other treaty interpretation methods are used, such as by looking the original intent of the parties or by teleological interpretation. Thus, it is still a debatable issue between Japan and Korea. Yet, it is

easier to put the damages suffered by the comfort women in the coverage of reparation clause of Japan-Indonesia treaty since the literal formulation is broader and not restrictive to the tangible and property valued rights.

Despite the wider scope of reparation provided by Japan-Indonesia peace treaty, the existence of waiver clause and dispute settlement choices in Japan-Indonesia peace treaty are more legally restricting the probability of presenting the claim of comfort women than the provisions of Japan-Korea treaty. Both treaties have waiver clause, which extinguished the rights to diplomatic protection through interstate claims and the claims filed by individuals against individuals. However, the waiver clause in Japan-Korea Treaty could only be applied to property, rights and interests which defined in the Agreed Minutes annexed to the treaty as all kinds of substantial rights of which the property values are recognised based on the law. The category was not formulated rigidly so that it opened the way to different interpretation between Japan and Korea whether the comfort women claim includes in that category. Different perceptions about the interpretation of this provision were rather profitable for Korea because it led to the dispute settlement mechanism. Moreover, the phrase “between the High Contracting Parties and between their nationals” in the waiver clause only extinguished the right to diplomatic protection and the right of Korean nationals to file claims against Japanese nationals, but it does not extinguish Korean nationals’ claim rights against the Japanese government. Thus, attempts by the comfort women to sue the Japanese government in Japanese domestic court are valid and may become the basis of local remedies exhaustion.¹⁸⁶

The waiver clause in Japan-Indonesia treaty obliged Indonesia to refrain itself for presenting a new claims of any type rights, either by itself through diplomatic protection or by its nationals against Japan and Japanese nationals. The waiver was a condition accepted by Indonesia so that Japan agreed to implement the reparation

¹⁸⁶ Seok Woo Lee and Hee Eun Lee, *The Making of International Law in Korea: From Colony to Asian Power* (Leiden and Boston: Brill Nijhoff, 2016), 74.

clause by paying the money to Indonesian government. Nonetheless, following the development of international human rights law, the existence of this waiver clause must not hinder the presentation of damages claims for reparation arise from the gross violation of human rights. The clause is not effective since human rights issue covered by *jus cogens* absolutely prevails over the treaty as stated in Article 53 of Vienna Convention on the Law of Treaties 1969.

The dispute settlement choice in Japan-Indonesia treaty is also a source of problem. Japan-Korea treaty provided wide selection of non-judicial dispute settlement choices, such as all types of dispute settlement through diplomatic channel and arbitration as the last resort. As stipulated in 2006 ILC Draft Articles of diplomatic protection, the range of diplomatic channels are wide, including protest and request for an inquiry of the case, negotiation, mediation and conciliation. Besides, those types of dispute settlement does not bear high political cost. On the other hand, Japan-Indonesia treaty only includes negotiation as the primary choice, thus it closed the probability to use other types of non-judicial proceedings. Furthermore, the parties chose judicial settlement under ICJ as the last resort. If it is used, it will certainly burden the parties with high political cost, particularly for Indonesia, whose economy is heavily dependent with trade activities with and Official Development Assistance (ODA) from Japan. Thus, this is probably one of the reason of Indonesian government reluctance in exercising diplomatic protection.

Third, the lack of mechanism to invoke Indonesian government in performing the duty of diplomatic protection was another reason why it is difficult for Indonesian comfort women to obtain the protection. Republic of Korea has the right to diplomatic protection construed clearly in its constitution and if the government perform omission of not granting the right, there is constitutional complaint mechanism that can be used to sue the government. In reality, the mechanism was used by the Korean comfort women and the concerned group to invoke the responsibility of the Korean government and fortunately the constitutional court

upheld their right. On the other hand, the Indonesian constitutional court does not have jurisdiction over constitutional complaint or the like mechanism which can facilitate the former comfort women to sue Indonesian government for the act of omission of not performing diplomatic protection. They only rely on the helping hand of Indonesian and Japanese pressure groups who volunteer to raise the issue in international forums attended by Japanese government or its representative.

The example of voluntary efforts was when Indonesian comfort women activists, supported by Japan Action for Resolution of the 'Comfort Women' Issue, arranged a resolution to invoke the responsibility of Japan in The Asian Solidarity Conference held in 1992.¹⁸⁷ Recently, one of non-governmental organizations, Amnesty International also helped Indonesian activists to remind Japan in the CEDAW Universal Periodic Review in 2016 that Indonesian victims are still waiting for Japan to acknowledge its legal responsibility on the crimes committed against the former comfort women. The reminder was delivered after the Japanese Cabinet Secretariat Chief, Yoshihide Suga, remarked that Japan does not intend to launch new negotiations about the comfort women issue with other countries after reaching a bilateral agreement with Republic of Korea in 2015. The organization stated that, it would not be fair if only Korean victims be the only one who have the access to redress. The victims of other countries, including Indonesia, must not be treated discriminatively based on their nationality.¹⁸⁸

Of all the legal restraints explained above, it could be concluded that it is still a long way to go to achieve the proper diplomatic protection for former Indonesian comfort women. However, following the development of international human rights law, there are indeed several newly discovered solutions to solve the legal problems

¹⁸⁷ Women's Active Museum on War and Peace (WAM), "Japan's Military Sexual Slavery: NGO Alternative Information to the Government Reply to the List of Issues," (paper, Committee on the Elimination of Discrimination against Women 63rd Session Meeting, Geneva/Japan, 2016), 13-14.

¹⁸⁸ Amnesty International, "Japan Submission to the Committee on the Elimination of Discrimination against Women (paper, Committee on the Elimination of Discrimination against Women 63rd Session Meeting, Geneva/Japan, February 15-March 4, 2016), 3.

revolving around diplomatic protection and they will be subjects of discussion in the following chapters.

Chapter 4. Linking Diplomatic Protection and International Human Rights

4.1.Problems Caused by Legal Fiction: The Missing Link

Legal fiction forced diplomatic protection to be perceived not as a legal duty for a state. When a state decides to exercise diplomatic protection, usually it depends on these factors: the ability of the injured national to establish the facts of the ill-treatment by the foreign state that he or she has experienced, whether the national has taken exhaustive steps to correct the wrong, whether the case is meritorious and whether the state itself is equipped with the effective tools and policies to face the delinquent state.¹⁸⁹

The provision of human rights treaties, which confer the right of individuals to claim protection against violations and the obligation of states to protect the individuals, has shifted the paradigm from emphasis of the state's right to the importance of individual rights. However, the state-centric nature of diplomatic protection is in contradiction with the individual-centric nature carried by international human rights law. The legal fiction used in diplomatic protection denied the existence of individual rights by repeatedly stating that in exercising diplomatic protection, state does not assert individual rights, but its own right.

Unlike diplomatic protection, human rights law did not permit a state to perform diplomatic protection only whenever it is willing. The language of international human rights treaties always proclaims the duty to protect its own nationals when subjected to serious violation of human rights, particularly in the case of a breach of *jus cogens* norms.¹⁹⁰ For example, Article 2 of the International Covenant on Civil and Political Rights (ICCPR) used the language that obliges state parties to “undertake to respect and to all individuals within its territory and subject to its

¹⁸⁹ Anthony Aust, *Handbook of International Law* (Cambridge: Cambridge University Press, 2010), 167.

¹⁹⁰ John Dugard, “Diplomatic Protection and Human Rights: The Draft Articles of the International Law Commission,” 24 *Australian Year Book of International Law*, 75 (2005): 81.

jurisdiction the rights recognized in the Covenant.” Article 6 of the Convention on the Elimination of Racial Discrimination (CERD) obliges that state parties shall assure to everyone within their jurisdiction effective protection and remedies, through competent national tribunals and other institutions, against violation of rights.

Giorgio Gaja, Italian international jurist and current judge of the International Court of Justice (ICJ) once asserted that focus of the individual as the rights holder has two consequences. First, a state cannot exercise diplomatic protection or choose not to exercise it against the wish of an individual. Second, the individual has the right to reparation as the protection was exercised based on individual rights.¹⁹¹ Those two consequences cannot be extracted from the International Law Commission (ILC) Draft Articles on Diplomatic Protection 2006 as the ILC admitted that the draft articles were not written in the language of human rights.¹⁹²

The legal fiction becomes unrealistic when applied in the case of human rights violations. Concretely, it results to the unwillingness of a state to exercise diplomatic protection, even in the case of violation of *jus cogens*. The states will always perform political calculation whether the policy of diplomatic protection will be beneficial for their national interests. This is proved in the case of Japanese military comfort women. Most states are unwilling to perform diplomatic protection on behalf of these women since doing so will risk their well-maintained economic and political relationship with Japan.

¹⁹¹ G. Gaja, “*Droits des états et droits des individus dans le cadre de la protection diplomatique* [State rights and the rights of individuals in the context of diplomatic protection],” in *La Protection Diplomatique, mutations contemporaines et pratiques nationales* [Diplomatic Protection, contemporary changes and national practices] ed. J.F. Flauss (Brussels: Bruylant, 2003), 68-69.

¹⁹² Dugard, “Diplomatic Protection,” 83.

4.2. Significance of Diplomatic Protection to the Application of International Human Rights Treaties

The next question to answer is for what reason duty to perform diplomatic protection becomes necessary in the case of human rights violation. Do international human rights treaties confer human rights to diplomatic protection? The answer to the question is that there are no such human rights to diplomatic protection. However, similar to some examples of provisions mentioned before, international human rights conventions always oblige the state to ensure the human rights of their nationals within its territory and subject to its jurisdiction. The formulation of these conventions often triggers interpretation that the duty to protect is only limited beyond territorial borders of the state of nationality or state parties to the conventions. Thus, diplomatic protection is needed to extend the duty to protect human rights extraterritorially.¹⁹³

Special Rapporteur John Dugard pointed out the importance of diplomatic protection to extend the scope of duty to ensure human rights in human rights conventions by stating:

If a State party to human right convention is required to ensure to everyone within its jurisdiction effective protection against violations of the rights contained in the convention and to provide adequate means of redress, there is no reason why a state of nationality should not be obliged to protect its own nationals when his or her most basic rights are seriously violated abroad.¹⁹⁴

This commentary envisages that diplomatic protection extends jurisdiction of international human rights convention not only on the basis of territoriality, but also on the basis of nationality. However, it should be noted that the extraterritorial exercise of human rights through diplomatic protection is restricted by foreign state's

¹⁹³ Noura Karazivan, "Diplomatic Protection: Taking Human Rights Extraterritorially," *The Canadian Yearbook of International Law*, Vol. 44 (2006): 326-327.

¹⁹⁴ United Nations, International Law Commission, *First Report on Diplomatic Protection* by Special Rapporteur John R. Dugard, A/CN.4/506 (2000), 225-226, para.89.

sovereignty over its territory. This is the reason why local remedies must be exhausted before resorting to diplomatic protection.¹⁹⁵

4.3. Significance of Diplomatic Protection to Human Rights Enforcement in Asia

Development of international human rights law has emphasized the protection of individuals, thus permitting an individual to directly file a claim against the state who violates his or her right in front of regional human rights court. One of the prominent example is individual applications under European Convention of Human Rights (ECHR). European Court of Human Rights may receive applications from any person or group of individuals claiming to be the victim of human rights violations by one of ECHR parties and of the kind of rights set forth in the convention and its protocols.¹⁹⁶ Yet, unless all domestic remedies have been exhausted, the applications will be deemed inadmissible by the court.¹⁹⁷

United Nations Human Rights Treaty Bodies also offer procedures that permit individuals to directly complain about the violation of human rights committed by states. Anyone can lodge a complaint with a committee of treaties against a delinquent state if two conditions are satisfied. The state in question is a party to the treaty and it has accepted the committee's competence to examine individual complaints under the treaties or its optional protocols. It is not mandatory to have a lawyer to prepare the complaint, although it is suggested to have one since the UN does not provide any legal aid under these procedures.¹⁹⁸

Unfortunately, the violation of comfort women's rights mostly occurred in the jurisdiction of Asia and the continent does not have any regional human rights court

¹⁹⁵ Ibid., 220, para.60.

¹⁹⁶ Article 34 of European Convention on Human Rights (ECHR).

¹⁹⁷ Article 35 (1) of ECHR.

¹⁹⁸ United Nations Human Rights, Office of the High Commissioner, *Individual Complaint Procedures under the United Nations Human Rights Treaties*, Fact Sheet No.7/Rev.2 (New York and Geneva: United Nations, 2013), 9.

or mechanism to enable direct claims of individuals. Another choice left is an individual complaint under human rights treaty bodies. There are several competent treaty bodies that receive the individual complaint under the comfort women issue. Among them are the Human Rights Council, CERD Committee and CEDAW Committee. However, there are some remaining issues that hinder the comfort women to use these procedures. First, neither Japan as the delinquent state has ratified the optional protocols of ICCPR¹⁹⁹ and CEDAW²⁰⁰, nor has it accepted the competence of CERD under the convention. Even if Japan received the competence of the committees to decide upon individual complaints submitted by the former comfort women, it would have led to the second issue that the committees' decision, although represent authoritative interpretation of the respective treaties, only contains non-legally binding recommendations.²⁰¹ Third, it is doubtful that the contemporary human right conventions could cover the numerous list of crimes against comfort women committed during the World War II since most of the conventions was concluded after the occurrence of the crimes.

Since individuals are not regarded as the subject of international law and Asia does not have any access to either regional court or individual complaints under UN human rights treaties, injured individuals cannot invoke the reparation at the international level directly. In other words, a basis to transform the individual claim to interstate claims and proceedings is needed. In the case of Asian comfort women, diplomatic protection is the only way to connect the link between the injured individual and the delinquent state, so that invocation of delinquent state's responsibility, as well as the restoration of the victims' rights can be achieved.

¹⁹⁹ United Nations, *Treaty Series*, Vol.999, 171, last updated on April 2, 2019, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV5&chapter=4&clang=_en.

²⁰⁰ United Nations, *Treaty Series*, Vol.2131, 83, last updated on April 2, 2019, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8-b&chapter=4&lang=en.

²⁰¹ United Nations Human Rights, *Individual Complaint*, 11.

4.4.Ways of Linking Diplomatic Protection and International Human Rights

There is a debate between international scholars on how to implement a state-centric diplomatic protection suitable for enforcing human rights. Some scholars argued that the legal fiction in diplomatic protection has become outdated, and thus it has to be discarded and replaced by agency doctrine. Agency theory means that when exercising diplomatic protection, the claimant state acts as an agent for the individual. As a result, the state will not assert its own right, but the right of the injured individual alone. However, this solution will not solve the problem, since individuals still lack personality despite the development of international human rights law.²⁰²

International human rights law may confer the human rights directly to the individual, but it does not make her or him a subject of international law. If the state only asserts individual rights when invoking the responsibility of the delinquent state, the remedies available are still limited and the enforcement could not be guaranteed.²⁰³ For example, when the dispute between the injured individual (represented by the state of nationality) and delinquent state is settled, there is probably a need to conclude an international agreement pertaining to the reparation. However, since the individual lacks personality, it is not possible for the individual to sign and ratify the treaty by himself. A national state, although acting as an agent, will conclude the agreement in vain, since the international agreement cannot transfer the rights to the individual. Instead, it only confers the rights and obligation to state as a solid subject of international law.

The legal fiction also cannot be abandoned when the injury suffered by the individuals also injured real national interest of the state. This can happen when an injury was suffered systematically by a significant number of nationals, indicating

²⁰² Dugard, "Diplomatic Protection," 76.

²⁰³ Ibid., 77.

the practice of discrimination to a particular state's nationals. In such case, the state of nationality is obviously injured.²⁰⁴

Indeed, the legal fiction remains necessary to guard the certainty of reparation and enforcement. However, some modifications have to be carried out to repress the state-centric nature of the legal fiction, so that it can be used to enforce human rights. Concretely, the state will have to assert its own rights, but at the same time it has to assert the rights of the injured individual when presenting the claim.

ILC Draft Articles on Diplomatic Protection 2006 did not prohibit this double rights assertion since some of its provisions are in contradiction to the legal fiction itself. For example, the rule of continuous nationality established in Draft Article 5 requires a state to prove that the injured national remained its national after the injury occurs and up to the time of the presentation of claim. Exhaustion of the local remedies rule and the practice of determining the form and amount of reparation to accord with damages suffered by the individual also show an element of effort to uphold individual rights.²⁰⁵ If we strictly rely on legal fiction, there is no need to impose those requirements as mandatory, for it is not the right of nationals asserted. However, this rule shows that a state in reality does not assert its own right only, but also the rights of its injured national.²⁰⁶

Commentary of Draft Article 1 also discloses that when constructing the definition of diplomatic protection, ILC did not rigidly defined whose rights are the state asserting when exercising the right to diplomatic protection. Instead, it left open the question whether the state exercising the procedure does so in order to assert its own right or the right of its national or both.²⁰⁷

Asserting both state and individual rights when performing diplomatic protection is the only way to link diplomatic protection and human rights. Linking

²⁰⁴ Ibid.

²⁰⁵ Ibid., 78.

²⁰⁶ Commentary on Draft Article 1 on Diplomatic Protection 2006, para. (3).

²⁰⁷ Ibid., para. (5).

means to omit or at least dilute the state-centric nature of diplomatic protection, and thus it can be employed as an effective tool to enforce international human rights law, which is individual-centric in nature. The process of linking mainly involves manipulating the existing norms of customary international law pertaining to diplomatic protection to become “individual friendly”. The modification is possible as the norms of diplomatic protection are still open-ended in status and the treaty attempting to codify the norms is still in the form of a draft.

Customary international law could emerge not only from international practices such as governmental actions or inactions in international relations, diplomatic notes, decision of international courts and tribunals, as well as practices and resolutions of international organisations, but also from national practices such as national legislations, government manuals, ministerial or official statements and judicial decisions of domestic courts.²⁰⁸ For this reason, norms modification could be achieved by two means:

1. Top-down mechanism

Literally, top-down mechanism means directly negotiating the individual-centric norms and inserting them to the codified draft articles of existing customary international law. Another form is through the practice of regional and international courts that limit the discretion of executive power, albeit the cases are still rare. In these ways, there is a hope that states of nationality will follow the practice because the sense of legal obligation has been built at the supranational level since the beginning of the norms foundation.

2. Bottom-up mechanism

This mechanism involves proliferation of national legislations and national courts’ decisions which guard the right to obtain diplomatic protection, permitting the interference of the judicial organ to limit the discretion of the executive organ or empowering individuals to seek the protection. When these practices become

²⁰⁸ Martin Dixon, *Textbook on International Law* (Oxford: Oxford University Press, 2013), 32-33.

solidly and consistently embodied in the national law of a big number of states, it will be sufficient to constitute *opinio juris* at the international level. As a consequence, international law makers will not have a choice, except of integrating the modified norms to the pre-existing system.

The next sections will discuss several solutions or norms modifications that enable to build the missing link between diplomatic protection and international human rights. Some of the solutions may be possible for execution through both aforementioned mechanisms, while some others may be possible to employ just one of them. In the explanation below, the solutions are sorted from the ones with the least possibility to be carried out to the ones with the high possibility of enforcement.

4.5.Diplomatic Protection as a Legal Fiction

Diplomatic protection is defined as the invocation by a state, through diplomatic action or other means of peaceful settlement, of the responsibility of another state for an injury caused by an internationally wrongful act of that state to a natural or legal person that is a national of the former state with a view to the implementation of such responsibility.²⁰⁹ Diplomatic protection emerged from the state practices to become customary international law and ILC has attempted to codify the law in Draft Articles on Diplomatic Protection 2006.

The scope of diplomatic protection comprises the cases of ill-treatment of nationals abroad or extraterritorial.²¹⁰ However, there is an accepted view that the limit of extraterritorial can be expanded in the situation of the injuring state's effective control over the national state's territory.²¹¹ It can also be categorized as territorial because the injuring state, through effective control of the national state's territory and its inhabitants, exercises governmental authorities that are supposedly exercised by the occupied state. For example, in the case of Korean comfort women

²⁰⁹ Draft Article 1 on Diplomatic Protection 2006

²¹⁰ Commentary on Draft Article 1 on Diplomatic Protection 2006, para. (3).

²¹¹ Karazivan, "Diplomatic Protection," 335.

who are employed by the Japanese military inside the territory of Korea, Korean territory was counted as abroad since it was colonised by Japan at the time of the violations.

The expansion is also possible in a different way, when the violations happen in a third state under the effective control of a delinquent state.²¹² For example, in the case of comfort women, Japan transported a huge number of Korean comfort women to third countries, such as Southeast Asian countries. When the breach of international law occurred, Japan who had to bear the legal responsibility to the Korean comfort women, not the Southeast Asian countries. This is because the countries were under the effective control of Japan at the time.

Diplomatic protection through diplomatic action covers the lawful procedures employed by a state to inform the delinquent state of its views and concerns. This includes protest and request for an inquiry or for negotiations aimed at the settlement of disputes.²¹³ The example of this type is the request for inquiry made by the Korean government to the Japanese government to investigate the crime conducted against comfort women during World War II in 1992. Other means of peaceful settlement constituted in Draft Article 1 ranges from negotiation, mediation and conciliation to arbitral and judicial dispute settlement.²¹⁴ One of the examples covered in this type is the negotiations between Korea and Japan in 2015.

In the early development years of international law, the individual had no place to assert its right in international legal order. Therefore, protection of individual rights could only be achieved by means of a fiction, that an injury of the national is deemed as an injury of the state itself.²¹⁵ Thus, it justifies turning an individual claim that is impossible to be presented at the international level, into an interstate dispute.

²¹² Ibid., 336.

²¹³ Commentary on Draft Article 1 on Diplomatic Protection 2006, para. (8).

²¹⁴ Ibid.

²¹⁵ Commentary on Draft Article 1 on Diplomatic Protection 2006, para. (3).

This fiction was derived from a doctrine adduced by an international Swiss jurist, *Emmerich de Vattel* in 1758 who said, “Whoever ill-treats a citizen indirectly injures the state, which must protect that citizen.” The state of the injured citizen must avenge the deed of the delinquent state and if possible, force the state who caused injury to give full satisfaction. Unless the state of nationality does this, the citizen will not obtain the protection necessary in civil society.²¹⁶

It should be understood that Vattel’s notion of diplomatic protection was born from his influential perception on the law of nations. Vattel’s law of nation is the law of sovereigns.²¹⁷ The fact that individuals have interest in law of nations does not make them significant to have shares in council of nations and participate in determining their policy.²¹⁸ According to Vattel, human rights have no place in the international legal order as it only fosters merely because states voluntarily dilute their sovereignty for the sake of developing international relations.²¹⁹ These thoughts have influenced the current concept of diplomatic protection as a system that are positivist, state-centric and lack of recognition of individual human rights.²²⁰

Vattelien fiction trigger that diplomatic protection is associated with an absolute discretionary right. In the drafting process of Draft Articles on Diplomatic Protection 2006, states showed their adherence to this concept. One prominent supporter, the United Kingdom, stated that whether or not to bring the claim on the basis of diplomatic protection and how to settle it are the prerogative decision of the state. This perspective has been reiterated in domestic law in the exercise of foreign affairs, thus positioning it outside the scope of judicial review.²²¹

²¹⁶ Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, trans. C.G. Fenwick (Washington D.C: Carnegie Institution, 1758), 316.

²¹⁷ *Ibid.*, 9a.

²¹⁸ *Ibid.*, 12a.

²¹⁹ P.P. Remec, *The Position of the Individual in International Law According to Grotius and Vattel* (The Hague: Martinus Nijhoff, 1960), 242.

²²⁰ Karazivan, “Diplomatic Protection,” 308.

²²¹ Colin Warbrick, “Diplomatic Representations and Diplomatic Protection,” *The International and Comparative Law Quarterly*, Vol. 51, No.3 (2002): 724.

Second, the fiction was applied on the Permanent Court of Justice (PCIJ) judgment in the case of *Mavromatis*. The dictum of the judgment asserted, “by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights, its right to ensure, in the person of its subjects respects for the rules of international law.”²²²

The consequence of the fiction is that ILC Draft Articles 2006 curbed diplomatic protection as a discretionary right of a state²²³ and omit the possibility under international law to impose it as a duty or obligation to the pertaining state. The internal law of a state may oblige a state to extend diplomatic protection to a national, but international law does not impose such obligation.²²⁴ This also means that when exercising diplomatic protection, a state does not act as an agent on behalf of an individual, for it is solely invoking its own right.

4.6.Diplomatic Protection as Obligation of States and Fundamental Right of Nationals

ILC has stated that there are some obligations imposed to the state, although limited, either under international law or national law, to protect its nationals abroad when their human rights have been seriously violated. Under international law, the norm comes from customary international law codified in Draft Articles on Diplomatic Protection formulated by ILC in 2006, while in national law, the norm is emerging from national legislation and judicial decisions of domestic courts.²²⁵

At the international level, the concept of diplomatic protection as fundamental rights of nationals *vis a vis* the obligation of the state was brought up by John Dugard, a Special Rapporteur appointed by ILC in 1999. In his first report on diplomatic

²²² *Mavromatis Palestine Concessions*, Series A No.2 (PCIJ. 1924) at 12.

²²³ Draft Article 2 on Diplomatic Protection 2006

²²⁴ Commentary on Draft Article 2 on Diplomatic Protection 2006, para. (2).

²²⁵ Commentary on Draft Article 1 on Diplomatic Protection 2006, para. (3).

protection, he investigated that the development of international human rights law should oblige states to exercise diplomatic protection. He suggested that Draft Article 4 (1) on diplomatic protection has to confer the obligation by stating:

Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of *jus cogens* norm attributable to another State.²²⁶

Nevertheless, John Dugard's suggestion of Draft Article 4 was perceived as too progressive to be accepted by the rest of the ILC members since state practices are lacking.

In the next meeting of the ILC, the abandoned suggestion was again discussed by the members. Italy suggested that a duty of states to perform diplomatic protection in the case of breach of *jus cogens* should be included in the draft articles.²²⁷ The reason behind the suggestion was that there are extraordinary cases where fundamental human rights violations are involved such as the right to life, torture, slavery and racial discrimination. In this case, it is highly probable that injured individuals are unable to resort to international judicial or quasi-judicial organs to receive redress. Denying diplomatic protection in such cases means leaving the individual without any remedy and thus would contradict to the principle of individuals' dignity in which international community sacredly adheres to.²²⁸

The positions of ILC members when facing Italy's suggestion were divided, with the number of disagreeing members equals to the supporting ones. Eventually, the compromise was reached between the members and the modified provision was included and recognised as Draft Article 19 in the final draft articles published in 2006 under the title "recommended practice".

²²⁶ Dugard, *First Report*, 223

²²⁷ United Nations, International Law Commission, *Comments and Observation Received from Governments*, A/CN.4/561/Add.2 (2006), 38.

²²⁸ *Ibid.*, 2-3.

According to Article 19 of the 2006 ILC Draft Articles, in the practice of diplomatic protection the states are encouraged to:

1. Give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred.
2. Take into account, wherever feasible, the views of injured persons with regard to the resort to diplomatic protection and the reparation to be sought.
3. Transfer to the injured person any compensation obtained for the injury from the responsible state subject to any reasonable deductions.

Draft Article 19 did not embody the currently existing customary international law, but it is a provision stipulated by ILC purely influenced by the development of contemporary international human rights law.

The provisions of Draft Article 19 are aspects of diplomatic protection which have not yet obtained the status of international customary law and are still unlikely to emerge into the binding law at the present. In other words, there are still no obligations for states to exercise diplomatic protection under international law. Nevertheless, they are desirable practices and necessary to foster the integration between diplomatic protection and international human rights law. In order to achieve these provisions as customary international law, more state practices through national law are desperately needed. The commentary of the 2006 ILC Draft Articles provided that although there is no obligation under international law, national law may oblige a state to extend diplomatic protection to a national. The suggestion stipulated in the commentary implied that there must be a provision of national law that either renders the right to diplomatic protection to the nationals or impose the duty to the state.²²⁹

According to the research conducted by Special Rapporteur John Dugard, there are many states that recognise the right of its nationals to receive diplomatic protection when they suffered from injuries abroad, mostly at the constitutional level.

²²⁹ Commentary on Draft Article 2 on Diplomatic Protection 2006, para. (2).

Those states are Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Cambodia, China, Croatia, Estonia, Georgia, Guyana, Hungary, Italy, Kazakhstan, Lao People's Democratic Republic, Latvia, Lithuania, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Spain, the Former Yugoslav Republic of Macedonia, Turkey, Ukraine, Vietnam and Yugoslavia.²³⁰ Interestingly, the number of Asian countries who follow this practice is far less the European countries. How each of the states formulated the right in their respective constitution will be elaborated below.

1. Republic of Korea

Article 2 Section 2 of the Korean constitution expressly states, "It shall be the duty of the State to protect citizens residing abroad as prescribed by Act." This provision does not directly point out the duty of state to perform diplomatic protection *per se*. Instead, it has broad coverage to any kind of protections, such as consular protection. However, in the case of the comfort women constitutional complaint, the Constitutional Court of Korea stated that Article 2 Section 2 leads the Korean government to perform an active action on behalf of the former Korean comfort women. Specifically, the provision may create a legal obligation for the government to exercise diplomatic protection since all the requirements under international law, such as exhaustion of local remedies and nationality rules, have been fulfilled. In addition, the court stated that the provision covers diplomatic protection extended by the state in their relationship with residing countries of individuals, in order to ensure fair treatment in all fields guaranteed by treaties, international laws and national laws.²³¹

On contrary to the prevailing interpretation of the court, three judges of the court dissented from the majority. Although the provision may be explicit as it seems, dissenting judges perceived it as nothing more than an abstract duty of the

²³⁰ Dugard, "Diplomatic Protection," 81.

²³¹ Challenge against the Act of Omission at 140.

state toward its citizens. Therefore, the provision in itself does not stipulate a duty of concrete action, even the duty to perform diplomatic protection.²³² Nevertheless, regardless of the dissenting opinion, the constitutional court decision reflects that the Republic of Korea acknowledged the duty to perform diplomatic protection under its constitution.

The Constitutional Court of Korea then stated that their interpretation was based on recommended practice in Article 19 of the 2006 ILC Draft Articles.²³³ This shows that the court has confirmed the existence of sense of legal obligation (*opinion juris*) to carry out the recommended practice in Draft Article 19.

2. The People's Republic of China

Article 50 of The Constitution of the People's Republic of China, under the title "Protection of Chinese while overseas", stipulated that the state protects the legitimate rights and interests of Chinese nationals residing abroad and protects the lawful rights and interests of returned overseas Chinese and the family members of Chinese nationals residing abroad.

It should be noted that China along with Korea has a number of nationals who became the victims of the comfort women system in World War II. Albeit there has not been any history of formal proceeding that shows how the right to diplomatic protection under the constitution can improve the situation of former Chinese comfort women. The Chinese survivors and their families have seen to recognise their rights under the constitution. This was shown when they filed a petition to the Chinese Foreign Ministry pushing for diplomatic protection on December 21, 2017.²³⁴

3. Russian Federation

²³² Ibid., at 122.

²³³ Ibid., at 150.

²³⁴ Li Yan, "Comfort Women' Push for Diplomatic Protection," last modified December 22, 2017, <http://www.ecns.cn/2017/12-22/285443.shtml>.

Russia imposes a positive obligation in Article 61 (2) of its constitution by stating, “The Russian Federation shall guarantee its citizens protection and patronage abroad.”²³⁵

4. Poland

Article 36 of the Polish Constitution states that a Polish citizen shall, during a stay abroad, have the right to protection by the Polish State.²³⁶ The usage of norm identifier “shall” means that it is a mandatory obligation for the state to ensure the right fulfilment.

5. Portugal

Article 14 of the Portuguese Constitution under the title “Portuguese abroad” stated that Portuguese citizens who find themselves or who reside abroad shall enjoy the state’s protection in the exercise of such rights.²³⁷

6. Hungary

At first, the Constitution of the Republic of Hungary (Act XX of 1949), Article 69 (3), stated that all Hungarian citizens are entitled to enjoy the protection of the Republic of Hungary while legally residing or staying abroad. Then, this provision was amended in 2011 and become Article XXVII Paragraph 2, stating that every Hungarian citizen shall have the right to be protected by Hungary during any stay abroad. The change shows that the protection has to be granted regardless the legality status of the residence.

How each state formulated constitutional based diplomatic protection differs from each other. Some states simply granted the right to the citizen in explicit languages, while other states used the frame of positive obligation. Positive obligation framework means placing a duty on the state authorities to take an active action to fulfil the constitutional rights. Usually the constitutional provision about the grant of right contains formulations such as “nationals of X shall enjoy protection

²³⁵ Article 61 (2) of the Constitution of the Russian Federation.

²³⁶ Article 36 of the Constitution of the Republic of Poland, April 2, 1997.

²³⁷ Article 14 of Constitution of the Portuguese Republic.

while residing abroad.” Positive obligation has formulations such as “the State shall protect the legitimate rights of X nationals abroad.” Most constitutions of states provide abstract and loose formulation, thus blurring the line between diplomatic protection, consular protection and other types of protection.²³⁸

Since the duty is expressly stipulated in the provision of national law, particularly national constitution, it is easier for individuals to protest to the government when it does not comply with the obligation. However, the practice of directly conferring the duty to the state or the right to the nationals through national law is still rare. Thus, there is need to look for another form of norm modifications and interpretations in national court decisions or the like.

4.7.Invocation of Diplomatic Protection

Providing remedy under national law when the state refuses to exercise diplomatic protection or when it is not properly executed almost became the obligation under international law as it was suggested in the first report by ILC Special Rapporteur, John Dugard in 1999. He suggested that as a complement to the states’ obligation to exercise diplomatic protection stipulated in Draft Article 4 (1) of his first report, Draft Article 4 (3) states:

States are obliged to provide in their municipal law for the enforcement of the right before a competent domestic court or other independent national authority.²³⁹

However, unlike Draft Article 4 (1) of the first report which was modified as Article 19 (1) in the final draft published in 2006, Draft Article 4 (3) was totally abandoned and excluded from the final draft on the grounds of lacking state practice.

Before the necessity of invocation mechanisms recognised by ILC, the judges of ICJ in *Barcelona Traction Case* realized its importance when it stated:

²³⁸ Dugard, *First Report*, 224, para.80.

²³⁹ Dugard, *First Report*, 223.

Within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and whatever extent it thinks fit, for it is own right that the state is asserting. Should the national or legal person on whose behalf it is acting considering that their rights are not adequately protected, they have no remedy in international law. All they can do is resort to municipal law, if means are available, with a view to furthering their cause of obtaining redress...²⁴⁰

The statement confirmed that the mechanism to enforce the right to diplomatic protection has not existed in international law, and thus the state is recommended to provide it through domestic law. The judgment also implied that the discretionary nature of diplomatic protection is possible to be controlled by an invocation mechanism.

Imposition of obligation of diplomatic protection on states will not be complete if there is no mechanism of enforcement. When the state refuse to perform diplomatic protection subsequent to serious injury or in the case when protection was performed, but was not appropriately executed, there must be a system that empowers an individual to invoke his or her constitutional right. It could be through a constitutional complaint before a constitutional court or before domestic courts or other independent authorities, when the right is stipulated at the constitutional level.

The example of a constitutional complaint employed effectively by individuals to invoke the right to diplomatic protection is the Constitutional Court of Korea's decision upholding the right of comfort women rendered on August 30, 2011. The Constitutional Court of Korea has jurisdiction over a constitutional complaint under Article 2 Section 5 of The Constitutional Court Act (last amended on March 20, 2018). A constitutional complaint before the Constitutional Court of Korea will be admissible if the complainant met two necessary requirements. First, the request is based on the infringement of basic rights guaranteed by the constitution due to the exercise or the non-exercise of governmental power, excluding a judgment of the

²⁴⁰ Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Rep 44 (1970), para. 78.

ordinary courts. The second requirement is that any remedy provided by other laws must be exhausted before filing the complaint.²⁴¹

In a constitutional complaint filed by former Korean comfort women, the request was based on the reason that the Korean government has not maximized its effort to perform diplomatic protection against Japan on behalf of the complainants. The non-exercise of governmental power was claimed to infringe the victims' right enshrined in Article 2 Section 2 of the South Korean constitution. The victims also have exhausted any possible remedy by filing a civil and criminal complaint to several Japanese domestic courts since 1991. Since the two requirements are met, the court was willing to examine the merits of the case and upheld that the Korean government inaction infringes the right of the complainants. This invocation mechanism did not end in vain. Its effectiveness was proved when the government of Korea eventually reached a bilateral agreement with Japan pertaining to the comfort women issue in 2015.

Another option that differs from filing a complaint to a domestic court is to enact a statute, which allows individuals submitting a request or petition for assistance to the government, to consult what kind of protection and the form of reparation to be sought and to be informed about the progress of diplomatic action undertaken to protect their interest. It would be accurate to address the 'government' in question as the Ministry of Foreign Affairs since it has the most relevant authorities in the case of diplomatic protection. This mechanism is ideal when the injury concerned involves grave breaches of human rights.²⁴²

4.8. Judicial Review of Diplomatic Protection

An invocation mechanism will not be complete without the review mechanism in the case when the protecting government does not exercise diplomatic protection

²⁴¹ Article 68 (1) of The Constitutional Court Act last amended on March 20, 2018.

²⁴² Paolo Palchetti, "Judgment 238/2014 of the Italian Constitutional Court: In Search of A Way Out," *QIL, Zoom out II* (2014): 45-46, http://www.qil-qdi.org/prova-3/#_ftnref4.

properly. The norm comprising this solution can only be formed by a bottom-up mechanism as the consideration to limit discretionary power of executive through judicial review is purely the domestic affair of a state. The provisions and commentaries of the 2006 Draft Articles on diplomatic protection does not have a say about this norm. Specifically, none of the recommended practices in Draft Article 19 refers to this. Thus, this solution is a norm that has not yet emerged at the international level.

Diplomacy goes beyond the relationship between the state in an international environment composed of different value and laws. Therefore, it is undeniable that diplomacy is an area where the broad discretion is enjoyed by the government in policy making because it has to take into account the situations and nature of the dispute, political landscape in and outside the country, international laws and common practice.²⁴³ However, the Constitutional Court of Korea agrees with the idea that the domain diplomacy must be subject of judicial review by stating:

“Rights guaranteed under the constitution are binding on all state powers, so administrative authority should be exercised in a way that fundamental rights are guaranteed effectively in accordance with the duty to protect fundamental rights, and the domain of diplomacy cannot be completely excluded from those subject to judicial review, either. For diplomatic actions associated with people’s fundamental rights, if a failure to fulfil the duty to take concrete action as reviewed earlier is decided as a clear violation of the constitutional duty to protect fundamental rights, it should be declared as an act of fundamental rights infringement and thus unconstitutional. Ultimately the discretion of the respondent should inevitably be restricted to the reasonable scope consistent with the binding force of fundamental rights on government institutions, taking into account factors such as the gravity of the violated fundamental rights, urgency of the risk of fundamental rights violation, possibility of providing a legal remedy and consistency with national interest.”²⁴⁴

Not only in the Republic of Korea, judicial review of diplomatic protection in the case of serious violation of human rights was also supported by judgments issued

²⁴³ Challenge against the Act of Omission at 147.

²⁴⁴ Ibid.

by national courts from various countries. The most salient examples are Germany, the United Kingdom, the Netherlands and South Africa.

1. *Rudolph Hess Decision*

This case was about challenging non-exercise of diplomatic protection by the government of Germany. Rudolph Hess, the complainant, was sentenced by the Allied Forces in the Nuremberg Trial with life imprisonment for his role in the Nazi regime. He filed a complaint against the Federal Republic of Germany arguing that the government was obliged to perform diplomatic protection on his behalf since his detention were against the rule of international law.

The right to diplomatic protection was not stated clearly in German constitution or other regulations. Regardless of the law vacancy, Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) did not declare the case non-justiciable on the ground of over-stepping the authority of executive organ (*acte de gouvernement*). Instead, it went far to examine the case merits, until the point of measuring whether the duty was performed decently or not. The court found that the duty of diplomatic protection was indeed implied under the constitution. However, the government of Germany enjoyed a wide discretion on how to perform the duty. The court further discovered that the government had actually provided a decent efforts to protect the complainant by improving the situation of detention, although the result was not what actually desired by the complainant.²⁴⁵

2. *Abbasi & Annor v. Secretary of State for Foreign and Commonwealth Affairs*

Mr. Abbasi, a Guantanamo Bay detainee complained that United Kingdom should have exercised diplomatic protection on behalf of him since his arbitrary detention violated international human rights, particularly *jus cogens* norm.²⁴⁶

²⁴⁵ Rudolph Hess, Federal Constitutional Court, December 16, 1980, reprinted in 90 ILR, 387,396, in Holly Cullen et.al., *Experts, Network and International Law* (Cambridge and New York: Cambridge University Press, 2017), at 40.

²⁴⁶ Regina (Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs (EWCA Civ, 2002) in 125 ILR, 685-726, paras. 6, 22, 28-29.

Thus, the complainant requested the constitutional court to review whether the government's inaction was on the contrary with his constitutional rights. The British court accorded with his claim that his human rights are violated. Furthermore, although international law did not oblige the state to exercise diplomatic protection, the court agreed to assess the inaction of the UK government as the complainant requested and founded that there is the scope of judicial review of government's refusal to render diplomatic protection.²⁴⁷

The court did not deny that diplomatic protection is a discretionary right of an executive organ, and thus there is no duty to exercise it. When there is no duty stipulated, there will be no reason to conduct judicial review. However, in this case, the judicial review was possible to be performed on the basis of the doctrine of "legitimate expectation".²⁴⁸ The court stated that legitimate expectation provided a solid basis for giving legal effect to a settled policy or practice in the exercise of administrative discretion. Legitimate expectation means that a person may have reasonable expectation of being treated in a certain way by administrative authorities because of one of the two alternative conditions has been met. First, the authorities have been practicing the treatment consistently from the past. Second, the concerned authorities have made an express statement to perform the treatment.

Regarding the first condition, the court found that British citizens have at least a legitimate expectation that they will be rendered diplomatic protection if the rules (continuous nationality and exhaustion of local remedies) are fulfilled. Since the government of the UK act consistently with the rules in respect of protection of nationals abroad, the complainant expected the government to act accordingly.²⁴⁹

²⁴⁷ Ibid., paras. 69, 79-80.

²⁴⁸ Ibid., para. 82.

²⁴⁹ United Nations, International Law Commission, *First Report on Diplomatic Protection : 1st Addendum* by Special Rapporteur John Dugard, A/CN.4/506 and Add.1 (2000), in Ibid., paras. 36,41.

The court also found that the second condition of legitimate expectation existed. In particular, the UK government has made an express promissory statement (commitment) on diplomatic protection policy, even when it falls within its wide discretionary power. The express statement brought a consequence that it became the subject of judicial review, notwithstanding its discretionary nature.²⁵⁰ Conclusively, the British court did not clearly state that diplomatic protection is thoroughly within the domain of executive power, but it stated that in certain circumstances, it is appropriate for the national court to issue a mandatory order, summoning the respondent to take the complainant's case into consideration.²⁵¹

3. *M. Kujit. v. The Netherlands*

Mr. Kujit, a Dutch national, had been held in pre-trial detention in Bangkok on the allegation of drug trafficking. Six years later in 2003, he filed his complaint against the Netherlands. He complained that his detention violated *erga omnes* norms and invoked the obligation of the Dutch government to improve his situation.²⁵² In particular, he expected the Dutch government to strive by obtaining the redress from the government of Thailand and by undertaking every effort to secure his release.²⁵³

The court stated that his complaint could not be condoned since the government was unable to command the Thai government on how to treat their detainees. Nevertheless, the court expected the Dutch government to continue striving to assist the complainant and to undertake all possible measures to secure the release of the complainant as soon as possible. In the court's view, all possible efforts and measures have not been fully undertaken.²⁵⁴ The order to perform all

²⁵⁰ Ibid., paras. 88-91.

²⁵¹ Ibid., para. 104.

²⁵² *M. Kujit v. The Netherlands*, LJN. No. AF5930, Roll No. KG 03/137 (March 18, 2003), para. 2.2.

²⁵³ Ibid.

²⁵⁴ Ibid., para. 3.8.

possibilities to improve the complainant's rights shows that the court had allowed itself to restrict the discretionary powers of the executive organ.

4. *Samuel Kaunda and others v. The President of the Republic of South Africa and others*

The decision of this case was rendered by Constitutional Court of South Africa in August of 2004. The complainant requested that the South African government's inaction of not performing diplomatic protection for their detention in Zimbabwe to be declared as a violation of international law norms. They also feared that if the government did not perform diplomatic protection, they would be extradited by Zimbabwe to Equatorial Guinea with the probability of facing an unfair trial and death sentence. Thus, they expected the South African government to negotiate with Zimbabwe and Equatorial Guinea so that their rights of freedom and security as a person, as well as fair trial and detention would be ensured.²⁵⁵

The South African Constitutional Court faced the question whether diplomatic protection must be considered as a human right under international law, and thus it needs to be performed on behalf of the injured person in the case of a grave breach of human rights as a legal duty of the state of nationality.²⁵⁶ The court answered the question by stating that the current prevailing view is that international law does not recognise diplomatic protection as human rights, and thus cannot be enforced as such by holding it as obligation *vis a vis* state of nationality. Thus, the court partially rejected the claim which was based on a right to diplomatic protection in international law.²⁵⁷

Subsequently, the court inquired whether the right of diplomatic protection exists under national law derived from South African Constitution and discovered

²⁵⁵ *Kaunda and Others v President of the Republic of South Africa* (CCT 23/04) [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) (August 4, 2004), para.3.

²⁵⁶ *Ibid.*, para. 28.

²⁵⁷ *Ibid.*, para. 29.

that the right in question is not explicitly provided in the law either.²⁵⁸ The court thought that diplomatic protection might be an unenforceable right itself, and thus it needs to be enforced through other enforceable rights. The court turned to consider whether the right to diplomatic protection can be derived from the rights, privileges and benefits of citizenship stipulated in Section 3 of the Constitution of the Republic of South Africa.²⁵⁹ The finding was that there is no such right to diplomatic protection and there is no duty of state to protect as it would be an interference with sovereignty of other states to demand the right to diplomatic protection through a national constitution.²⁶⁰ However, it found that South African nationals are entitled to request the state for protection under international law against legally wrongful acts of a delinquent state. Entitlement is based on the reason that individual nationals are not in position to demand enforcement of international law by themselves, and thus they need to seek protection from the state of nationality. As a consequence, the individuals are rightful to have their request considered and answered appropriately.²⁶¹ The decision whether or not to exercise diplomatic protection must comply to the standards to meet the individuals' legitimate expectation and must not be considered arbitrarily.²⁶²

On the contrary with the previous findings, the court argued that it cannot dictate the government on how to execute diplomatic protection of its nationals when considering the discretionary nature of executive action. However, the court has jurisdiction over governmental actions and this includes the authority to examine an allegation that the government has failed to respond to a request of

²⁵⁸ Ibid., para. 34.

²⁵⁹ Ibid., para. 58.

²⁶⁰ Ibid., para. 40.

²⁶¹ Ibid., paras. 60-63.

²⁶² Ibid., para. 136.

diplomatic protection properly. Yet, this does not mean that the court could order the government to provide what the court condones as proper protection.²⁶³

Justice Arthur Chaskalson, a judge of the South African constitutional court representing the majority, personally added a statement. He said that what justifies judicial review is that the true beneficiary of the right asserted is indeed the individual and it corresponds with the duty of the state to protect.²⁶⁴ Based on the reason, discretion in diplomatic protection should not be immune from judicial scrutiny and the standard of judicial intervention is the irrationality of the discretion.²⁶⁵

Although not all of the examples of court decisions presented above upheld the claim of individuals, the courts did not declare the case as non-justiciable in the first place. According to the traditional view, diplomatic protection has always been deemed as the discretionary right of a state and it is solely under the domain of executive authority (*acte de gouvernement*). Consequently, the courts should have strictly declared any request to review the actions or inactions performed on the basis of diplomatic protection, to be non-justiciable.²⁶⁶ However, the dismissal based on this reason was not shown by the above-mentioned national courts decisions, as well as the Korean constitutional court decision. Thus, the current practices have broken the exclusivity of diplomatic discretion, when action or inaction of government in the pertaining field inflicts the fundamental rights of nationals.

The willingness of the courts to deem the case justiciable and to examine the merits of the cases may amount to intervention of the executive affairs. These judicial interventions are indeed efforts to implement the states obligation to protect human rights of their nationals enshrined in all international human right treaties.

²⁶³ Ibid., paras. 78-79.

²⁶⁴ Ibid., paras. 29-30.

²⁶⁵ Ibid., para. 35.

²⁶⁶ H. Fox, "International Law and the Restraint on the Exercise of Jurisdiction by National Courts of States," in Malcolm D. Evans, *International Law* (Oxford: Oxford University Press, 2003), 377.

The national courts are starting to consider the growing importance of human rights and the lack of enforcement measures available for individuals to restore the rights. The complainants of “diplomatic protection judicial review” or by whatever name the procedure was called, shared the same thought that it is necessary to oblige national states to exercise diplomatic protection in the case of serious human rights violations. In this way, the injured individuals could obtain the access to court and effective remedy under international human rights law.²⁶⁷

There are two conclusions to be drawn from the national court cases. First, currently some states are willing to stipulate the right to diplomatic protection of its nationals and mandatory duty in order to perform the protection under their national law, particularly at the constitutional level. Second, the current development shows that national courts can review the exercise or non-exercise of diplomatic protection and whether the states have responded properly to a request of diplomatic protection. In this way, diplomatic protection can be optimized to enforce human rights of individuals enshrined in international law.

The three aforementioned mechanisms are ways to humanize diplomatic protection. Until now, the prevailing view is that diplomatic protection is merely a state-centric mechanism in which individuals have no contribution. The three practices mentioned above have still accorded the status of *lex ferenda* and only time will answer when it will emerge as customary international law. It needs more consistent and continuous state practices, as well as *opinio juris* to make it happen.

It should be noted that all of the three practices are intertwined with each other. Conferring the right to diplomatic protection to nationals can only be achieved if there is such an invocation mechanism to demand the fulfilment of the right. A written right and an invocation mechanism are also meaningless if there is no such

²⁶⁷ Annemarieke Vermeer Kunzli, “Restricting Discretion: Judicial Review of Diplomatic Protection,” *Nordic Journal of International Law*, 75 (2006): 280.

forum to assess whether the government has actually performed its obligation to fulfill the right.

4.9.Striking the Balance between *Lex Lata* and *Lex Ferenda* of Diplomatic Protection Practices

This section will talk about how progressive development on diplomatic protection through the dilution of its state-centric characteristic still has a long way to go since the law as it exists (*lex lata*), has not undergone any dramatic changes to that direction. This is because the obvious reluctance of some states to incorporate the progressive law to their national legal systems and the law itself still has certain imperfections to secure the balance between individuals' and states' interest. Those two problems have to be discussed in order to find a way to compromise between the traditional view and progressive view.

Judicial review is probably the most significant of all three solutions discussed previously, since proponents of the traditional view of diplomatic protection perceive the mechanism as the biggest threat to the discretionary power of the executive. Regulation of the right or obligation to perform diplomatic protection, even the invocation mechanism equipped to an individual, would only be seen as constitutional embellishments without the authority of judicial review. Judicial review is the main goal of the two other solutions since it is the final resort to control the discretionary right to diplomatic protection and dilute its state-centric nature. However, in reality there are many national courts who rejected to perform judicial review of diplomatic protection. The tendency could be inferred from these following cases.

1. *Isabelita C. Vinuya etc. v. The Honorable Executive Secretary Alberto G. Romulo et al.* (The Philippines)

It can be inferred from the previously presented case examples that European and African countries were proved to be more progressive in accepting the idea

to review the governmental discretion. On the other hand, reluctance could still be seen in Asian countries. In contrast with the Korean constitutional court decision, Philippines former comfort women's request to review the state's inaction to protect them was dismissed by the Supreme Court in the *Vinuya v. Philippines* case.

The petitioners, Philippine former comfort women, asked the Supreme Court to perform judicial review on the question whether a Philippine executive organ choice for not espousing petitioners' claims for official apology and other forms of reparation against Japan constituted a grave abuse of discretion. The court responded by saying that from a domestic law perspective, an executive organ has the exclusive prerogative to decide whether to espouse a petitioners' claim against Japan. Based on this reason, the court declared that the petition lacks merit and had to be dismissed.²⁶⁸

Political question doctrine in the Philippines domestic law prohibited the judicial body to review the discretion of a Philippines executive organ. The doctrine was originated from US law and was associated with the separation of powers in a state. The doctrine suggested that three branches of a state (executive, legislative and judicial) have to act only within the scope of authority given by the constitution and must not trespass on each other's authority.

The Supreme Court of the Philippines cited the United States Supreme Court decision in the case of *Baker v. Carr* as the starting point of political question doctrine development. In that decision, the Supreme Court of the United States explained that solving any case involving a political question was the domain of the executive branch. It was not assigned to the judicial branch and judicial intervention on that matter is never be accepted based on various reasons. First, solving a political question is textually assigned to the executive organ as a

²⁶⁸ Isabelita C. Vinuya etc. v. The Honorable Executive Secretary Alberto G. Romulo etc., G.R. No. 162230 (Republic of the Philippines Supreme Court, 2010), 20.

commitment based on the constitution. Second, legal systems are probably lacking discoverable and manageable standards to solve it. Third, on several occasions it is impossible to decide on a case involving a political question without an initial policy determination through non-judicial discretion. Fourth, there is the impossibility of the court to undertake independent resolution of the case since intervening the authority of the executive body as a coordinate branch to the judicial body would amount to rummaging the independence of executive itself. Fifth, there is a worry that a conflict triggered by a contravening pronouncement from the executive organ to the judicial organ will occurs, following the judicial intervention.²⁶⁹

The Supreme Court of the Philippines continued to reiterate some cases from the United States Supreme Court to support its consideration on foreign relation cases. For instance in the *Oetjen v. Central Leather Co.*, one of the categories of cases involving political questions are foreign relations. It is prevalent that the constitution strongly established the conduct of foreign relations to the executive and legislative, the political branches of the government. Thus, what political bodies may have performed in the exercise of their political power must not be a subject to judicial inquiry.²⁷⁰ Moreover, in *Chicago and S. Air Lines, Inc. v. Waterman S.S. Corp.*, as the Supreme Court of the Philippines cited, foreign relations are delicate, complex and involves large elements of forecasting since it has the ability to advance or imperil the welfare of people of a certain nation, once it is decided. The judicial organ often has neither aptitude, facilities nor responsibility to issue the decision on it.²⁷¹

According to Article VIII Section 5(2)(a) of the Constitution of the Republic of the Philippines, the Court possess the authority to construe or invalidate treaties and executive agreements in certain cases involving foreign relations.

²⁶⁹ 369 U.S. 186, 82 S. Ct. 691, 7 L.Ed.2d 663 (1962).

²⁷⁰ *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918).

²⁷¹ *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

However, to review whether the Philippine government should perform an interstate diplomatic protection claim of its nationals against a foreign state is a foreign relations matter. The constitution has assigned this matter not to the courts, but to the executive branch. In this case, the executive organ has already decided to waive all claims of its nationals for reparations against Japan through the San Francisco Treaty 1951 as a means to secure the best interest of the country. Such a decision was not for the national courts to question. Petitioners could not disprove the said decision by the instant petition for certiorari either.²⁷²

The court took side on government rebuttal, which explained that San Francisco Treaty 1951 as a peace treaty between Allied Forces and Japan was not intended for the complete and adequate reparation of the suffering caused by Japan during the war, but for security purposes. The treaty compromised individual claims in the collective interest of the free world in order to prevent the widespread of communism and fascism by the Axis Power. Japan who occupied the strategic position in Far East was no exception.²⁷³

When deciding not to espouse the comfort women claims, the executive organ has considered the above-mentioned political motive which constituted original intent of the peace treaty. Consequently, the government found that the espousal would be adverse to the Philippines foreign policy interest and could upset its relationship with Japan. For the court to overturn the discretion of the executive organ would be equal to assessing a foreign policy judgment by a coordinate political branch to the court. The non-subordination relationship between the court and executive body hindered the court to assess the foreign policy judgments made by executive discretion since the constitution confers wide discretion to exercise the authority.²⁷⁴

²⁷² Vinuya etc. v. The Honorable Executive Secretary, 22.

²⁷³ Ibid., 25-26.

²⁷⁴ Ibid., 23.

Furthermore, at the international level, the only chance for individuals to bring a claim within the international legal system is when he or she is able to persuade the government to espouse his or her claim. Even then, it is not the individual's rights that are being asserted through the espousal, but rather the state's own rights. The court did not deny that the state has a duty to protect its nationals and act on his or her behalf when the human rights are injured. This view is endorsed by a part of the international community, for example, the proposal of ILC Special Rapporteur John Dugard written in the ILC First Reading Draft Articles on Diplomatic Protection which contains the idea of defining diplomatic protection as a legal duty when it stems from the grave violation of *jus cogens* norm. However, the status *quo* shows that there is no sufficient evidence to establish the general international obligation for states to exercise diplomatic protection on behalf of their nationals abroad. Although the practice is desirable, neither state practice nor *opinio juris* has evolved to such direction. Even if it is an international duty like what John Dugard stated, it is merely a moral and not a legal duty.²⁷⁵ The absence of an international legal obligation prompted the court to argue that intervention or assessment to the discretion of exercising diplomatic protection could not be justified.

As a final statement, the court asserted that it is not within its authority to order the executive organ to take up petitioners' demand. It is only able to urge and advise the executive organ to consider the demand.²⁷⁶ This means that the court is not in the capacity to declare the constitutionality of executive discretion in a diplomatic field. In this way, the court showed adherence to the traditional view of diplomatic protection.

2. Cases of American victims of Japanese Slave Labourers and Prisoners of War (the United States)

²⁷⁵ Ibid., 29-31.

²⁷⁶ Ibid., 38.

The cases involved American victims of Japanese slave labourers during World War II. These were not related to the dismissal of claims against the government in respect of its omission for not performing diplomatic protection on behalf of the claimants, but they were related to the intervention of the US government to prevent claims against Japanese companies and Japan at the local remedy level.

The cases were mainly disputed under the Northern District of California, United States, under California Code of Civil Procedure (CalCCP) Section 354.6. as an implementing regulation from the San Francisco Treaty 1951. The regulation created a basis of claims for the Second World War victims of slave labourers and extended the statute of limitations for filing such claims to 2010.²⁷⁷

The total number of lawsuits filed by former slave labourers was over two dozens and they were directed against Japanese corporations and the Japanese government that had employed slave labours during the war. At first, they were filed through various districts courts in the United States, but the Federal Judicial Panel on Multidistrict Litigation consolidated the lawsuits to Judge Vaughn Walker on the Northern District Court of California based on a Transfer Order dated June 5, 2000.²⁷⁸

However, on September 21, 2000, Judge Walker dismissed the lawsuits filed by the former Japanese slave labourers on the grounds that the claims had been extinguished by the San Francisco Treaty 1951, including the claims arising out of actions taken by Japan and its nationals during the war.²⁷⁹ The court relied in the treaty waiver clause on Article 14(b) which states:

Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals

²⁷⁷ See California Code of Civil Procedure (CalCCP) Section 354.6.

²⁷⁸ Michael J. Bazylar, "The Holocaust Restitution Movement in Comparative Perspective," *Berkeley Journal of International Law*, Vol. 20, Issue 1 (2002): 12.

²⁷⁹ *Ibid.*, 28.

in the course of prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.²⁸⁰

The court based the dismissal on a Statement of Interest filed by the US government to intervene in the proceedings. The US government has the authority to file the Statement Interest pursuant to 28 U.S.C. Section 517 which permits the Attorney General to represent the interests of the US by intervening in any case pending in a federal court. The Statement of Interest was thrown out when a litigation involves a matter of critical national importance.

The Statement of Interest explicitly expressed that California Code of Civil Procedure (CalCCP) Section 354.6 was an impermissible intrusion under the federal government's foreign affairs authority. The government thought that the litigations under the statute could bring a critical situation to the national interests of the US. In particular, leaving open the possibility of future claims until 2010 would be an obstruction to the current peaceful condition based on some reasons. First, the statute enabled endless filing of claims and could complicate relations between the countries involved, particularly since it created judicial forums that generated negative commentary about the Japanese government and Japanese corporations. Second, the flow of uncontrolled reparation claims would result in futility since Japan was undergoing a difficult financial condition at the time. Even if Japan was forced to compensate all the claims, it would wreck Japan's economy and create misery and chaos of democratic Japan which can become the seeds of communist flourishing. In other words, it would be contrary to the prevention of wide-spreading communism as purposes and policy of the United States in the field of foreign relations.²⁸¹

²⁸⁰ "Treaty of Peace with Japan," conclusion date September 8, 1951, *United Nations Treaty Series*, Vol. 136, No. 1832 (1952): 46, <https://treaties.un.org/doc/Publication/UNTS/Volume%20136/volume-136-I-1832-English.pdf>.

²⁸¹ John Haberstroh, "In Re World War II Era Japanese Forced Labor Litigation and Obstacles to International Human Rights Claims in U.S. Courts," *Asian American Law Journal*, Vol.10, Issue 2 (2003): 262-263.

Even though the cases did not involve direct judicial review of diplomatic discretion, these cases show that the domestic court in the US does not have any courage to institute a proceeding when the interest of the executive branch is at stake. Since the matters of foreign relations are inside the domain of the executive branch, the court as an equal political branch to the executive branch has to respect executive decision by not intervening in its discretion, particularly in respect to foreign policy. It could also be implied that the US government was not willing to institute any interstate claims based on diplomatic protection against Japan on behalf of American nationals since it had negated the probability by extinguishing the claims at the local remedy level and the court had already declared that it did not have the authority to stop the executive action.

3. *HMHK v. The Netherlands* (The Netherlands)

The case started in 1983, when K, a Dutch national made an agreement with X, an undercover police officer of the Federal Republic of Germany. The agreement required K to deliver a consignment of narcotics to X in the German territory. In May of 1983, when delivering the consignment to X, K was apprehended by a German police and put into the custody. In October of 1983, K's counsel begged the Dutch Secretaries of State so that Justice and Foreign Affairs could initiate arrangement with German authorities to drop the proceeding against K and to return him to the Netherlands. The Secretary of State for Justice responded to the request in December of 1983 by stating that as K had voluntarily entered to the German territory and had been arrested for drug offences there, there was no basis for intervention by the government of the Netherlands. The Secretary of Foreign Affairs to whom the request was also sent, did not give any response.²⁸²

²⁸² E. Lauterpacht and C.J. Greenwood, "HMHK v. The Netherlands," *International Law Reports*, Vol. 94 (1994): 342-343.

Upon the rejection, K sued the Secretary of State for Justice to the District Court on the basis that he was entitled to diplomatic protection during the stay abroad. The District Court dismissed the application holding that there was insufficient evidence to suggest that his entry to Germany was involuntary and therefore the Secretary of State had not acted unlawfully. The District Court held further that the provision of diplomatic protection to nationals by the executive branch was purely discretionary as it fell within the power of executive in respect to conducting foreign relations. Thus, K was not automatically entitled to diplomatic protection.

K then appealed to The Hague Court of Appeal on November 22, 1984. However, the appeal was dismissed on the grounds that a state was not obliged, under international law, to provide diplomatic protection to its nationals abroad. Furthermore, although under Dutch law the state is obliged to protect its nationals abroad, the state and its diplomatic representative had a wide discretion in determining the level of protection. Assessing whether that discretion had been exercised in an appropriate manner was primarily a matter for parliament and not the court. The court could only intervene if the assistance was below the reasonable level of expectation.

The judges' consideration in this case shows that Dutch courts adhere dominantly to the traditional view of diplomatic protection. The courts did not have the courage to deny the wide discretion possessed by executive organ in providing diplomatic protection for its nationals abroad. However, it stated the little glimpse of hope that someday the courts would like to intervene, if the assistance was below a reasonable level. What is deemed as a reasonable level was not explained by the courts. Nevertheless, its development was seen in the prior explained case of *M.Kujit v. The Netherlands* in 2003 that involved the court's statement to recommend the executive on performing all possibilities to improve the complainant's rights.

4. *Khadr v. Canada (Minister of Foreign Affairs)*

Khadr was a minor Canadian national arrested in Afghanistan in 2002 because he was alleged to be involved in Al-Qaeda activities. He was detained by the US forces in Guantanamo Bay. His family brought an application of *mandamus* to Federal Court of Canada to request the Canadian government to extend consular and diplomatic protection to Khadr. The complainants argued that the minister of foreign affairs, by failing to provide those protection, had infringed the rights under the Canadian Charter of Rights and Freedoms and contravened its duties regulated in the Department of Foreign Affairs and International Trade Act (DFAIT Act). The claimant also alleged that the government has infringed on the rights of Khadr under ICCPR and Convention on the Rights of the Child (CRC), as well as its obligation under Vienna Convention on Consular Relations 1963. As the response of this complaint, the government of Canada filed an application for an order to strike the application, alleging the absence of cause of action.²⁸³

The court rejected the argument that the government infringed on the rights of Khadr under Canadian Charter of Rights and Freedoms since the charter did not have extraterritorial reach. The court stated that there could be a probability whether the government was liable for violations of human rights abroad even if it does not inflict those violations itself, provided there was a sufficient connection between the acts of the Canadian government and the deprivation of rights. However, in this case, the court did not find any sufficient connection between the acts of the Canadian government and deprivation of Khadr's right. Moreover, Canada was under no positive obligation to ensure the right to life, security and liberty stipulated in Section 7 of the charter. Thus, none of his rights under the charter were violated by the government.²⁸⁴

²⁸³ *Khadr v. Canada (Minister of Foreign Affairs)*, 2004 F.C. 1445 (Docket T-686-04) [Khadr].

²⁸⁴ *Ibid.*

The court also stated that there was no obligation of the Canadian government under ICCPR and CRC to provide diplomatic protection to Khadr. However, it is recognised that the Vienna Convention on Consular Relations conferred the individual rights to Khadr. The right scope was only in the field of consular protection and not including the right to diplomatic protection.²⁸⁵

The states shown above strongly adhere to the traditional view. Thus, it can be concluded that they persistently object the norm offered by the progressive proponents, particularly the permissive attitude on performing judicial review of diplomatic protection. Theoretically, the contributions of all state practices are equally significant to the creation of customary international law. However, in reality the practice of larger and more powerful states have been given greater significance than the practice of smaller states because bigger states usually are leaders of states blocks and they are relatively better in publicizing their practice.²⁸⁶ This can be shown in the contribution of the US and Canada that have been discussed previously. Consequently, this is probably why the position of diplomatic protection as solely discretionary right to the state has been conquering the international legal system for years and hindering the growth of progressive norms.

All of the above-explained court decision have commonality in depicting the court refusal to assess exercise or non-exercise of diplomatic protection by state of nationality based on two arguments. First, all the courts refuse to review diplomatic protection since it has remained a prerogative right of the state and the discretionary domain of executive branch. Assessing executive discretion is deemed as trespassing on the authority of the executive branch and it will be a disrespectful move to the coordinated political branch who supposedly have equal powers. Second, as a crucial obstacle to judicial review, there is indeed no legal duty of state under international law to perform diplomatic protection when significant injuries occur. Neither the

²⁸⁵ Ibid.

²⁸⁶ Murphy, *Principles of International Law*, 94.

legal duty is stipulated from the decision of international courts and codified customary international law in draft articles on diplomatic protection, nor is it conferred by international human rights conventions.

The *status quo* shows diplomatic protection solely as the right of state prevails over diplomatic protection as the right to individuals. This is because international law does not either confers the individual right to diplomatic protection or obliged it as a mandatory duty of states. However, the proliferation of national law of states that put diplomatic protection in one or both of those progressive categories for the sake of the development of human rights triggers the debate among international law scholars. Some international lawyers are refusing the idea that the proliferating domestic laws will significantly lead to the creation of an international obligation to exercising diplomatic protection. They are called proponents to the traditional or positivist view. Their arguments were based on ICJ's consideration in the *Barcelona Traction Case* which asserted that the existence of domestic remedies to control the discretion of the state in the field of diplomatic protection remains within the domain of national law and does not have any influence internationally.

The municipal legislator may lay upon the State an obligation to protect its citizens abroad, and may also confer upon the national a right to demand the performance of that obligation, and clothe the right with corresponding sanctions. However, all these questions remain within the province of municipal law and do not affect to position in internationally.²⁸⁷

The opinion in *Barcelona Traction* was endorsed by a part of the ILC members in their report published in 1998.

As regards to which law governed diplomatic protection, it was generally agreed that it was international law. In this context, it was noted that some governments in their constitutions committed themselves to their nationals to exercise diplomatic protection. The view was also expressed that such national

²⁸⁷ Barcelona Traction, para.78.

laws did not affect the discretionary right of the State to exercise diplomatic protection.²⁸⁸

In short, ILC underlined that it is still uncertain in what sense and how far the said practices in domestic law will shake the unwavering perception of diplomatic protection as a discretionary right of state. In addition, Special Rapporteur Bennouna observed one more proof that weakens the normative change through domestic laws. It is the fact that some constitutional texts only stipulated the duty of states to perform diplomatic protection as a moral duty, rather than a legal obligation, since political considerations and the degree of appropriateness will always obviously influence the willingness of state of nationality.²⁸⁹ To some extent, it is true since most provisions about the latter also lacks of sanctions required in formation of legal duty. Thus, how that moral duty can elevate to an international legal duty is impossible to the positivist proponents.

On the contrary, other international lawyers believe that the recognition of an individual right to diplomatic protection in the domestic legal systems is a proof of a strong practice that someday will influence the creation of emerging customary international norms. The proponent of this progressive view is obviously John Dugard who recommended the inclusion of right to diplomatic protection and invocation mechanism into the draft articles. Through his report, he also compiled and identified the states who adheres to this practice.²⁹⁰

It is undeniable that most of the customary international law norms such as the determination of territorial sea width and the doctrine of state responsibility has been developed almost thoroughly by the decisions of international courts. However, such norm like state immunity is more influenced by the judgments of domestic courts.²⁹¹

²⁸⁸ United Nations, "Report of the International Law Commission on the Work of its Fiftieth Session, April 20 – June 12 and July 27 – August 14, 1998, Official Records of the General Assembly, Fifty –third Session, Supplement No.10, A/53/10," *Yearbook of the International Law Commission*, Vol. II, No.2 (1998): 48, para.100.

²⁸⁹ *Preliminary Report on Diplomatic Protection* by Mohamed Bennouna (1998), 316, para. 48.

²⁹⁰ Dugard, *First Report*, 224-225, paras.80-86.

²⁹¹ Anthony Aust, *Handbook*, 145.

This fact shows that there is a possibility that customary international law norm could flourish not only from international practices, but also from the national practices of the states.

The suggested solutions to ‘humanize’ diplomatic protection, such as provision of individuals’ right to diplomatic protection at the constitutional level, invocation mechanisms and judicial review, have not been codified as a new obligatory norms in the ILC Draft Articles of Diplomatic Protection. They are emerging mostly from constitutional court decisions, and thus they can be addressed as phenomena of global constitutionalism. Global constitutionalism is a circumstance when the decision of constitutional courts of states in the international community influence the formation of customary international law norms. The process involves the act of imitation of constitutional practice of one state by other states in identical cases. The process will repeat continuously until a sense of legal obligation formed among states, and thus the imitated substantial norms be adhered internationally.²⁹²

The attitude of only referring to the customary international law regarding diplomatic protection from the international court decisions and other international practices ends up on over-emphasizing the state-centric nature of the norm since they are always restricted by the sovereignty of states. On the other hand, the international human rights are reflected better in the domestic court decision since domestic level is mostly where the individuals can actively participate in defending their rights. In this way, it can limit the overly wide discretion that empowers the diplomatic protection practice.

At the level of scholastic debate, judicial review of diplomatic protection is considered as a taboo by adherents of the traditional view. For instance, the Special Rapporteur Mohamed Bennouna of ILC submitted a preliminary report in 1998 which recommended that diplomatic protection must not be a subject to judicial

²⁹² Matias Kumm, “The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law,” *Indiana Journal of Global Legal Studies*, Vol.20, Issue 2 (2013): 620-621.

review and even after the exercise, it must not be amended by the decision of national court. This is based on the reason that the intention of the state of nationality is clearly influenced by political considerations and the degree of appropriateness so that its execution does not override interests of the state of nationality.²⁹³

In contrast, progressive proponents have been trying to convince the traditional proponents who seem to be sceptical towards judicial review by trying to confirm the misunderstanding between them. First, judicial review does not aim to negate the discretionary right of the state, but only to control and limit the discretion based on the legitimate expectation of nationals. Second, judicial review does not really aim to enforce individual's right to diplomatic protection, which the positivist scholars perceive as mere human rights idealistic, but to reach a closer and rational objective, which is to ensure due process of law. Consequently, due process assurance will lead to the goal of international human rights law, which is the enforcement of the violated rights. This notion is in accordance with the suggestion by international jurist, Orrego Vicuna, in his report to the International Law Association Committee on diplomatic protection.

The discretion exercised by a government in refusing to spouse a claim on behalf of the individual should be subject to judicial review in the context of due process.²⁹⁴

Ensuring due process means that the wide discretion possessed by the state in deciding diplomatic protection should be controlled and limited by a certain threshold so it will not constitute an arbitrary treatment of nationals.

Another apprehension of the traditional proponents is if international law obliges states to facilitate the individual request on judicial review of diplomatic protection, there will be floods of requests for the exercise of diplomatic protection

²⁹³ United Nations, International Law Commission, *Preliminary Report on Diplomatic Protection* by Mohamed Bennouna (1998), A/CN.4/484, 10, para. 48.

²⁹⁴ Orrego Vicuna, "The Changing Law of Nationality of Claims" (Final report submitted to International Law Association Committee on Diplomatic Protection of Persons and Property, London, 2000), 26.

and will lead to excessive intervention of executive discretion by judicial organs.²⁹⁵ Intervention through judicial review should be restricted or even avoided if it is subjected to the substantive merits of political decisions, such as diplomatic protection, primarily because judges who would impose the decision are not elected by the citizens. This practice is not in line with democracy which requires that the choice of substantive political decision is made by elected representatives who sit in an executive chair, rather than by unelected judges. Moreover, the normative and prescriptive views of the judiciary are too limited to be utilized in evaluating the highly political nature of executive discretion.²⁹⁶

Currently, the best way to alleviate this apprehension is to limit judicial review of diplomatic protection only for those resulted from the case of grave violations of human rights or *jus cogens* norms. Rights other than human rights may be exempted from this system. The second solution is the limitation to natural person as the subject to protect and the third is the limitation of the level of gravity, even in the case of human rights violation.

Implementation of those solutions were seen in the case of *Josias van Zyl and others v. The government of the Republic of South Africa and others*. The complainants were shareholder of various mining companies in Lesotho. In execution of the Lesotho Highlands Water Projects, the property rights of the applicants were expropriated without any compensation.²⁹⁷ The complainants then requested the South African government to perform diplomatic protection on behalf of them. The government responded by sending a *note verbale* to the government of

²⁹⁵ Vasileios Pergantis, "Towards Humanization of Diplomatic Protection," in *The Impact of Human Rights Law on General International Law*, edited by Kamminga M.T. and Scheinin M. (Oxford: Oxford University Publishing, 2006), 393.

²⁹⁶ Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of The New Constitutionalism* (Cambridge, Massachusetts, London: Harvard University Press, 2004), 189.

²⁹⁷ *Josias van Zyl and others v. the Government of the Republic of South Africa and others*, Case No: 20320/2002, 2005 (11) BCLR 1106 (High Court of Africa, July 20, 2005), para. 11.

Lesotho asking to consider the complainants' situation.²⁹⁸ However, further requests of diplomatic protection were refused.²⁹⁹

This case is different from other examples explained since it did not involve gross infliction of human rights, such as torture and physical abuses. Subsequently, the court also found that unlike the human rights violation, the true beneficiaries in the *Josias van Zyl* case are juridical persons, namely the companies. Consequently, the case should be set aside because the states have more advanced obligation to protect natural persons more than legal persons. Moreover, South African constitutional court stated that expropriation which is categorized as an international delict, should be distinguished from the infringement of international human rights in terms of gravity and thus due to the insignificant level of gravity, it should not be subject to a judicial review. Therefore, the court rejected the claim of right to diplomatic protection, as well as invocation of government legal obligation on behalf of the complainants.³⁰⁰ This case clearly limits that an obligation of state to perform diplomatic protection only restricted to the situations of grave human rights violations.

Nevertheless, proponents of the traditional view still perceive the limitation has unclear and inexact standards, particularly about the level of gravity for the violations which made the court declare whether or not the violated rights deserve to be protected under the mechanism of diplomatic protection. This matter, as perceived by John Dugard, has to be determined by giving a wide margin appreciation to the states.³⁰¹ However, such deliberation means adding a new work burden to the states. Moreover, the international dispute settlement mechanism for the possible dispute that occurs in the process of measuring whether the margin of appreciation is wide

²⁹⁸ Ibid., para. 14.

²⁹⁹ Ibid., paras. 13, 24, and 60-62.

³⁰⁰ Ibid., para. 41.

³⁰¹ Dugard, *First Report*, 225, para. 88.

or narrow, does not exist.³⁰² Progressive proponents admits that these flaws remain unsolved.

Judicial review also has its limit on the level of judgment implementation. Judges can declare that the action or inaction relating to diplomatic protection is unconstitutional but it cannot specifically order the executive organ to perform diplomatic protection according to judicial appropriateness. Judicial review can only urge and exhort the executive to do so.³⁰³ This flaw also has not been denied by the proponents of progressive development.

Furthermore, it is true that foreign relations envisaged in diplomatic protection, as asserted in the *Vinuya* case, are delicate, complex and involve large elements of prophesy. It is a decision that the judicial system has neither aptitude, facilities, nor responsibility. In the *Khadr* case, the Supreme Court of Canada also described foreign relations as complex and ever-changing circumstances and the impact of granting the request of diplomatic protection, to secure the complainant's repatriation, on Canadian foreign relations with the US could not be assessed by the court, but must be left to government's discretionary powers to decide.³⁰⁴

The judiciary could assess what diplomatic protection can do to improve the human rights of individuals, but it could not properly assessed the impact of the performance to foreign relations. Diplomacy aims to cool down the heated situation within foreign relations. It is also pragmatic by nature that what is central in the law, in the sense of what is the wrongful or harmful and what is the right, is not obligatory in the eyes of diplomacy. As a consequence, what is deemed as a just move by the law may not be executable in diplomacy. Furthermore, since diplomacy prioritizes the present over the past or "what's done is done" principle, retaliation principle recognised by law cannot be applied to diplomacy.³⁰⁵ This tendency is obviously

³⁰² Gaja, G. "Droits des etats," 31.

³⁰³ *Vinuya etc. v. The Honorable Executive Secretary*, 38.

³⁰⁴ *Khadr v. Canada (Prime Minister)*, 2010 SCC 3, 2010, 64-65, paras.39-40.

³⁰⁵ Monica E. Eppinger et.al, "Diplomacy and Its Others: The Case of Comfort Women," *Ewha Womans University Gender Law*, Vol. 6 (1) (2014): 5-6.

seen in the case of comfort women, where the states of nationality tend to forget invoking Japan's legal responsibility on behalf of maintaining a cordial relationship with Japan. Therefore, unless there is guarantee that judicial aim will accord to the diplomatic aim and there is a safeguard to national interest applied by the court, judicial review of diplomatic protection will never be sufficient to accommodate both human rights and national interests.

In short, the war between positivism who adheres to the traditional view and the progressive view who tried to adjust the said doctrine with the development of human rights, has not come to an end. However, the current situation shows that one view cannot be dismissed and then replaced by another view. The traditional view is still useful to solve the issue of individual representation in front of the international legal system and to guard the national interest of the states by preventing unnecessary and excessive intervention. Meanwhile, the progressive view cannot be abandoned either since it is in line with the goal of contemporary international law, which is the advancement of human rights of the individuals, rather than preserving the sovereign power of the states.³⁰⁶ Thus, compromise between the two is needed and the best solutions available is by leaving the discretion diluting mechanism as recommended practices, rather than mandatory. The limitation of judicial review based on the gravity of the violations and limitation on the subject of protection should also be maintained to strike the balance between the traditional view and the progressive view.

³⁰⁶ Ibid., 87.

Chapter 5. Revising Diplomatic Protection System in Indonesia

5.1. Formulating a Proper Interpretation of the Japan-Indonesia Peace Treaty

Indonesian comfort women activism was raised in 1993 and demanded the Indonesian government espouse their claims against Japan. However, the Indonesian government rejected the demands on the grounds that the waiver clause in the peace treaty had extinguished all of the claims. This circumstance showed that the function of the waiver clause is to nullify all the claims against Japan in respects to its conduct committed throughout World War II, either filed by the Indonesian government or by Indonesian nationals. In other words, it also aims to hinder the espousal of Indonesian nationals' claims against Japan through an interstate mechanism such as diplomatic protection. As a result, after Japan paid the amount of reparations specified in the treaty,³⁰⁷ other claims which were not presented before the payment was made, would be deemed invalid or expired. This position has been adopted by the Indonesian government until the present day.

However, the prohibition of slavery in the comfort women case is a *jus cogens* norm and should prevail over the waiver clause stipulated in Article 4 Paragraph 2 of the Japan-Indonesia Peace Treaty 1958. This stance is in accordance with Article 53 of the Vienna Convention on the Law of Treaties that said, "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." Thus, the Indonesian government should have considered the existence of serious international violations of peremptory norms in the case, before declaring that it shared the same peace treaty interpretation with Japan.

³⁰⁷ Article 3 of Reparations Agreement between Japan and the Republic of Indonesia, signed at Jakarta, January 20, 1958 stipulates, "The two Governments shall fix through consultation an annual schedule specifying the products and services to be supplied by Japan each year."

This interpretation also does not comply with the prevailing international law norms that assert non-applicability of the expiry period in respect of claims arising from serious crimes under international law. This principle was introduced in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (GA RES 2391 (XXIII) of November 26, 1968). It can be applied in the case of comfort women since the latter falls within the category of crimes against humanity and war crimes. It is also stipulated in the contemporary international treaty, such as Article 29 of the Rome Statute of the International Criminal Court, that those categories of crimes shall not be subject to any statute of limitations.³⁰⁸ Now, the principle has evolved as a part of customary international law, particularly in terms of *jus cogens*.

The existence of this non-applicability of statutory limitations principle as a part of customary international law has been recognised by the ILC in their studies of the crimes against comfort women. In the reports resulting from investigations into the comfort women cases by special rapporteurs discussed in the previous sections of this thesis, non-applicability of statutory limitations to war crimes and crimes against humanity invalidated the statute of limitations in the case of claims for compensation for damages caused by the pertaining crimes.³⁰⁹ Another report from the Special Rapporteur of the Sub-Commission on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law, Theo van Boven, endorsed that the statutes of limitation shall not run concurrently during periods when no effective remedies exist for violations of human rights and humanitarian law. Civil claims relating to those violations shall not be subject to statutes of limitations.³¹⁰ Non-

³⁰⁸ Article 29 of "Rome Statute of the International Criminal Court," conclusion date July 17, 1998, *United Nations Treaty Series*, Vol. 2178 (2002): 3, <https://treaties.un.org/doc/Treaties/1998/07/19980717%2006-33%20PM/volume-2187-I-38544-English.pdf>.

³⁰⁹ McDougall, *Report on Contemporary Forms of Slavery 1998*, 22, para.87.

³¹⁰ United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Administration of Justice and the Human Rights of Detainees: Revised Set of Basic Principles and Guidelines on the Right to*

existence of effective remedies remains obvious in the case of comfort women throughout Asia, thus their claims remain valid until these days.

This basis in international law was used in the case of the complaint brought by former Philippines comfort women to the Supreme Court in 2010. Former Philippines comfort women, as the petitioners in the case, argued that the waiver of claims manifested as agreed measures in the Treaty of Peace between the Philippine government and Japan is void on the grounds that prohibition of crimes against humanity, sexual slavery and torture constituted in the comfort women system are violations of *jus cogens* norms. Their status as *jus cogens* norms meant that no derogation is possible, including derogation generated by The Peace Treaty.³¹¹ Furthermore, they also asserted that the acceptance of unofficial “apologies” made by Japan and funds from the AWF were contradictory to international law, mainly the basic principles and guidelines on the right to remedy and reparation.

This is how Indonesian comfort women should support their arguments to reiterate their claims and ensure a proper interpretation of the Japan-Indonesia Peace Treaty. Until now, the struggle of Indonesian comfort women has relied only on the sentimental anger against the Japanese occupation as well as opposition to Japan involvement in Indonesian political and economic policy. The activists have not voiced any legal basis in international law to counter the statement made by the Indonesian government, especially pertaining to the statement that the peace treaty has negated the claims of the comfort women. Demanding protection from the government without any legal basis is an exercise in futility. Furthermore, the activists have not utilized the basic international principles on the right to remedy

Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law by Theo van Boven, E/CN.4/Sub.2/1996/17 (1996), 4, para.9.

³¹¹ Vinuya etc. v. The Honorable Executive Secretary, 6.

and reparation³¹² to counter the acceptance of the AWF fund by the Indonesian government in 1997.³¹³

This human-right based interpretation can help to solve the current problem faced by former Indonesian comfort women by declaring the validity of the women's claims under international law, but is still stuck at an abstract, normative level, without any possibility of implementation within national law. The interpretation can be manifested into reality only if Indonesia introduces national regulations of diplomatic protection and an invocation mechanism based on the commentaries and the recommended practices of the Draft Articles on Diplomatic Protection 2006.

5.2.Addressing Diplomatic Protection as the Right of Nationals and the Legal Duty of States

In the deliberation of constructing Draft Articles on Diplomatic Protection 2006, Indonesia is one of the states that insisted that diplomatic protection should remain a sovereign prerogative of the state, complete with full discretion since it must run parallel with the long-standing principle of sovereignty and territorial integrity. Regarding the relationship between diplomatic protection and human rights, Indonesia considers them two separate issues, since diplomatic protection should not be marginalized by human rights considerations and vice versa.³¹⁴

The Republic of Korea has a slightly different view on the issue of the legal duty to exercise diplomatic protection. Korea neither denied the necessity of legal duty, nor has it approved the concept either. The representative of Republic of Korea in the General Assembly meeting on the issue of diplomatic protection in 1998,

³¹² See Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violation of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly Resolution No. A/RES/60/147 (2006).

³¹³ Vinuya etc. v. The Honorable Executive Secretary, 7.

³¹⁴ United Nations, General Assembly, Sixth Committee, Fifty-third Session Official Records, Summary Record of the 15th Meeting, A/C.6/53/SR.15 (1998), 6, paras.37-38.

Choung Il Chee, stated that there was a need for more state practices and *opinio juris* before the issue could be considered by the ILC to be included in the draft articles.³¹⁵

This difference shows that the Republic of Korea is more welcoming of the progressive developments in perceiving the issue of diplomatic protection since it recognized the probability of evolving norms that make diplomatic protection the legal duty of states. The progressive attitude is perhaps the reason why the Republic of Korea conferred the duty to exercise diplomatic protection to the state at the constitutional level. The provision of the right through Article 2 Section 2 of the Korean constitution was shown to be potent in the Korean constitutional court's interpretation of the pertaining provision in the comfort women case. The provision of Article 2 Section 2 *per se* does not directly point out the duty of state to perform diplomatic protection, but the Korean constitutional court chose to interpret it progressively according to the Draft Articles on Diplomatic Protection 2006 so that diplomatic protection become a type of protection derived from the duty to protect mandated in the said provision.

Unlike Korea, Indonesia adopts a positivist view. There is neither any provision of Indonesians' right to diplomatic protection stipulated at the constitutional level or lower, nor in the history of such progressive interpretations of the existing constitution by any domestic courts. Likewise, national law does not impose positive obligations on the governmental authorities to protect the rights of Indonesian abroad. As suggested in the ILC special rapporteurs' research and reports, it is best to enshrine such right at the constitutional level. However, amending the constitution will take a long time. Thus, the best alternative is deriving the right from one of the pre-existing rights in the Indonesian constitution followed by the creation of a new provision concerning diplomatic protection at the statutory level.

³¹⁵ United Nations, General Assembly, Sixth Committee, Fifty-fifth Session Official Records, Summary Record of the 19th Meeting, A/C.6/55/SR.19 (2000), 13, para. 77.

Among the fundamental rights established in the Indonesian constitution, the right to diplomatic protection is most possibly derived from the preamble of the Indonesian constitution which states that the formation of the government of the Republic of Indonesia aims to protect all the people of Indonesia.³¹⁶ Furthermore, there is also stipulated obligation of the state in the field of protection, advancement, upholding and fulfilment of the human rights of Indonesian people in Article 28I (4) of the constitution. Those two constitutional provisions are likely to become the basis from which the regulation of diplomatic protection at a lower statutory level can be derived.³¹⁷

Indonesia may also refer back to the Foreign Relations Act under Law No. 37/1999, which contain the provision regarding the right to consular protection. However, as the scope of foreign relations should be broader than the scope mentioned therein. There is still a room to insert the provision regarding the right to diplomatic protection into the pertaining statute. In this way, victims of unsolved human rights problems by foreign countries, such as the Indonesian comfort women, will have a legal basis to urge the government to protect them.

5.3. Attributing the Tools to Invoke Diplomatic Protection

There are two ways to invoke diplomatic protection, as explained in the previous chapter, the constitutional complaint mechanism and the administrative complaint mechanism. The Republic of Korea chose the constitutional complaint mechanism to enable individuals whose constitutional rights are infringed as a result of governmental action or inaction to seek redress. The constitutional complaint mechanism is one of the five jurisdictions provided for by Article 2 of the Korean Constitutional Court Act, other than jurisdiction to adjudicate the constitutionality of statutes upon the request of the ordinary courts, impeachment, dissolution of a political party, and competence dispute between state agencies.

³¹⁶ Preamble to the Constitution of the Republic of Indonesia, para.4.

³¹⁷ Article 28I (4) of The 1945 Constitution of the Republic of Indonesia, last amended in 2002.

Article 68 (1) of Korean Constitutional Court Act stipulated that any person whose basic rights guaranteed by the constitution are infringed due to exercise or non-exercise of the governmental power, excluding judgment of the ordinary courts, may file a constitutional complaint to the constitutional court. Provided, any remedy should be exhausted in advance.

This mechanism was used effectively to render the decision upholding comfort women's constitutional right in 2011. It was utilized again in 2016, to object to the results of the presumed attempt at exercising diplomatic protection, through Japan-Korea bilateral agreement reached in December of 2015, as it was not accepted by the victims. In this newest constitutional complaint case, Lawyers for a Democratic Society represented 29 former comfort women and 41 relatives of both surviving and deceased comfort women. They claimed that the agreement was unconstitutional on the grounds that it infringes on the human dignity of the former comfort women. They stated that through the agreement, the government of the Republic Korea is preventing the former comfort women from asking Japan to compensate them for their damages.³¹⁸

Unlike Korea, the Indonesian Constitution, particularly Article 24C (1), only confers jurisdiction to the constitutional court over four specific matters. Those matters are reviewing laws against the constitution, determining disputes over the authority of state institutions, deciding on the dissolution of a political party and deciding disputes over the results of general elections. However, the court does not have jurisdiction over constitutional complaints regarding the government's omissions. In other words, it is not able to review governmental action or inaction against the constitution, particularly when the action or inaction is not provided for in the written domestic regulations.

³¹⁸ Young Ji Seo, "Lawyers Group Constitutional Complaint over Comfort Women Agreement," *Hankyoreh*, last modified March 28, 2016, http://english.hani.co.kr/arti/english_edition/e_international/737166.html.

The absence of jurisdiction to examine the case in terms of a constitutional complaint forces Indonesian lawyers to wrap matters of constitutional complaint in the clothes of judicial review. This means that the delinquent governmental act has to be linked normatively with any written regulation from which the act was legitimized. Nonetheless, some governmental acts are not regulated in written national regulations because they are simply deemed discretionary acts. The same nature is embodied by diplomatic protection. The decision of the government to exercise diplomatic protection is purely discretionary and how government should perform such protection is not regulated in any statutory law. The decision is influenced by various considerations, including whether or not such a decision will be beneficial to the country's political situation and diplomatic relations with delinquent states.

Non-existence of constitutional complaint mechanism in the Indonesian constitutional law system has left the former Indonesian comfort women powerless without any remedy to enforce their rights. They could not protest when the Indonesian government accepted AWF's fund in 1996 and refused to distribute the funds to individual comfort women. They can only voice their protests in international forums involving the Japanese government, but not in a formal international human rights forum sponsored by the United Nations since they have no backing from the Indonesian government. This is proved by the complete absence of any comment by the Indonesian government pertaining to the comfort women issue when UN human rights treaty bodies held multiple universal periodic review sessions involving Japan. These series of omissions constituted the violation of Indonesian comfort women's constitutional rights and were in contradiction with the obligation of the Indonesian government to protect, uphold and fulfil the human rights of the Indonesian people defined in Article 28I (4) of the Indonesian constitution.

There are two ways to insert the provision of constitutional complaint in Indonesian constitutional law system. The first way is by amending the constitution. However, the process will take a long time because in a political configuration with a multi-partite system such as Indonesia's, accommodating all the opinions and interests of huge numbers of political parties will make reaching a consensus a herculean task.

The second way is by revising the Indonesian Constitutional Court Act (Law No. 24/2003 as amended by Law No. 8/2011) by inserting the explicit provision for constitutional complaints.³¹⁹ This is more feasible than the first solution. However, if the revision is undertaken, it would deal with a debatable legitimation issue since Article 24C (1) of the existing constitution has specifically limited the authority of the court. A compromise solution might be sought by expanding the judicial review authority of the court, stipulated in the constitution and Constitutional Court Act, not only over the constitutional question of reviewing statutes against the constitution, but also over constitutional complaints. This expansion should be declared through legislative interpretation by the lawmakers³²⁰ or through judicial interpretation by the constitutional court in its decisions. However, in the current circumstances where at debate about the validity of the method still exists between law scholars, a moderate solution is not utilizing the interpretation method generally and permanently in all cases. Instead, either a judicial or legislative interpretation must be carried out on a case per case basis or upon request of citizens.³²¹

In the drafting process of the current Indonesian constitutional court act, some scholars suggested the inclusion of constitutional complaint mechanism to the

³¹⁹ Law Number 24 of 2003 on the Constitutional Court (The State Gazette of the Republic of Indonesia No. 98 of 2003).

³²⁰ Heru Setiawan, "Mempertimbangkan Constitutional Complaint sebagai Kewenangan Mahkamah Konstitusi [Considering Constitutional Complaint as the Authority of Constitutional Court]," *Lex Jurnalica*, Vol. 14, No. 1 (2017): 20.

³²¹ Rahmat Muhajir Nugroho, "Urgensi Pengaturan Perkara Constitutional Complaint dalam Kewenangan Mahkamah Konstitusi [Urgency of Constitutional Complaint Provision in the Authorities of Constitutional Court]," *Jurnal Ilmu Hukum Novelty*, Vol. 7, No.1 (2016): 22.

material jurisdiction of the court by modelling the current practices in South Africa and Germany. However, the suggestion was rejected by the government because of the apprehension about excessive case accumulation within the Indonesian constitutional court. There are also worries that this newly granted authority will overlap with the administrative court's authority.³²²

Such apprehensions are refutable because excessive case backlog can be avoided by requiring the exhaustion of all remedies available prior to the presentation of the constitutional complaint. Second, the overlap can be prevented by dividing the line of authority clearly through regulations and exhaustion of all available remedies via other institutions. Furthermore, instead of worrying about the overlap of authority, there is still an urgent problem that we have to deal with, namely the existence of many injustices that cannot be resolved due to the lack of such procedure in the general court system. Thus, the provision of a constitutional complaint mechanism is an important alternative to solve such problems.³²³

Another option is providing a regulation to empower a special administrative complaint against the Ministry of Foreign Affairs who obviously hold discretionary power over diplomatic protection. However, this is still deemed a new practice with several weaknesses as shown in the case of Korea. Former Korean comfort women use this mechanism by filing a suit against the government before the Seoul Central District Court, but it was dismissed on June 15, 2018 on the grounds that the Korean government has wide discretion over the matters and that judicial intervention would trespass the executive domain. Judges acknowledged the deficiency of the 2015 Korea-Japan bilateral agreement, but the plaintiffs have no rights to demand

³²² The Government of Republic of Indonesia, The People's Consultative Assembly, *Risalah Rapat Pleno ke-41 Panitia Ad Hoc I Badan Pekerja MPR [Treatise of 41st Plenary Meeting of Ad Hoc I Committee of People's Consultative Assembly Working Group]* (2000), 563.

³²³ Rahmat Muhajir Nugroho, "Urgensi Pengaturan Perkara Constitutional Complaint dalam Kewenangan Mahkamah Konstitusi [Urgency of Regulating Constitutional Complaint as the Authority of Constitutional Court]" (research report, Yogyakarta, 2015), 17.

compensation of damages.³²⁴ This mechanism has proven ineffective in the Korean case since the administrative court did not dare to intervene the discretion of the executive branch. Other than this, there have not been many state practices pertaining to this mechanism yet. All prevailing state practices positioned constitutional complaints as a tool to invoke diplomatic protection, such as South Africa in the *Kaunda* case, Germany in the *Rudolph Hess* case, the United Kingdom in the *Abbasi* case and the Netherlands in the *Kujit* case.

5.4.Fostering State Practices in Human Rights Based Diplomatic Protection in Asia

Diplomatic protection of comfort women in Korea is still flawed since it was not executed well and the agreement with Japan reached in 2015 has remained controversial up to now. However, the effort of the Korean judicial system to limit the discretion of the executive branch has pressed the Korean government to open a diplomatic channel with Japan for the purpose of discussing the issue. The efforts of the Korean government to hear the voice of the former comfort women, which subsequently resulted in a refusal to the AWF funds also needs to be appreciated. This policy shows that the Korean government still realizes the importance of individual reparations in the case of the gross violations of human rights. Overall, what the Republic of Korea has done for the sake of the former comfort women is still relatively more significant than efforts by other states which have done nothing, as if the issue did not actually exist. The measures taken by the Republic of Korea are in accordance with the recommended practices stipulated in the Draft Articles on Diplomatic Protection 2006 and its commentaries.

It is recommended that Indonesia follows the practices of the Republic of Korea, at least in opening the door to limit the discretion of the government in the sphere of

³²⁴ Han Sol Ko, "Court Dismisses Comfort Women's Suit against Government for Signing 2015 Agreement with Japan," *Hankyoreh*, last modified June 17, 2018, http://english.hani.co.kr/arti/english_edition/e_international/849403.html.

diplomatic protection. More specifically, Indonesia should revise its national laws so that it conform with the recommended practices stipulated in Draft Articles on Diplomatic Protection 2006 and its commentaries. The revision is urgent since the comfort women issue encompasses a serious human rights issue that has not been resolved and should not be neglected by the international community, particularly by Asian countries, from which most of the victims came. Currently, the issue is gradually disappearing as the number of Indonesian survivors declines. There has not been any media disclosure of the issues since the early 2010s, nor has a protest to Japan been delivered by the Indonesian government in any international forum.

If Indonesia follows the practice of Korea, other states of nationality of the victims, such as China, Taiwan and Malaysia will follow. The accumulation of comfort women claims through diplomatic protection proclaimed by a significant number of states of nationality will encourage the mass invocation of Japan's international legal responsibility, and thereby result in voluntary admittance of the said responsibility and reparation for all former comfort women around the world.

Conclusion

There are two points that can be concluded from this research. First, the current prevailing view is that diplomatic protection is solely a discretionary right of the state and there is no obligation in international law to provide such protection. However, emerging state practices through three stages, provision of the right to diplomatic protection to individuals or deeming it as a compulsory obligation for states in national law, invocation of the right to diplomatic protection through constitutional or administrative tracks and judicial review of diplomatic protection discretion by competent judicial body, play a significant role in providing the missing link between diplomatic protection and international human rights. It is because those domestic mechanisms have the ability to control the discretion to exercise diplomatic protection that they can be utilized effectively to enforce the individual rights that have been violated and via which reparations can be secured. Considering its importance, this progressive development must not be dismissed offhandedly.

On the other hand, the traditional view should be maintained since it is effective in resolving the issue of individual representation in front of the international legal system and protects the national interest of the states by preventing unnecessary and excessive intervention. The traditional view is still necessary because progressive practices still have imperfections, such the lack of standards to define which cases of diplomatic protection deserve a judicial review in term of gravity and rights' beneficiaries, inability of the judiciary to safeguard national interests alongside human rights idealism, inability of the judiciary to bind the executive with its decisions and inability of the judiciary to consider the aims of diplomacy. Unless those imperfections are improved, there is still a long way in terms of generating an international obligation of diplomatic protection.

The best solution to implement now is to maintain the balance between the traditional and progressive view by keeping the progressive practices as

recommendations, rather than declaring them as an obligation. This is in line with the norms stipulated in the ILC Draft Articles on Diplomatic Protection 2006 and its commentaries. It is also important to limit judicial review of diplomatic protection only to certain circumstances based on the gravity of the violations and based on who is the beneficiary of the violated rights. However, it is recommended that states implement the practices to solve long-standing cases of grave violation of human rights, such as the comfort women case, in order to ensure due process and further, the goals of contemporary international law, namely the advancement of the human rights of individuals.

In particular, Indonesia should implement some concrete moves to revise its national laws, in order to comply with the recommended practice provided by Draft Article 19 on Diplomatic Protection 2006 and its commentaries, as well as emerging state practices from the global constitutionalism phenomenon in order to solve the long-standing suffering of Indonesian comfort women. It is also recommended that Indonesia follows in the footsteps of the Republic Korea since its practices are identical to the recommended practices stipulated in the draft articles and since Republic of Korea is the first state in Asia to legitimize the judicial intervention with regard to discretion of diplomatic protection through the constitutional court decision on behalf of human rights advancement.

The initial step is to realize that the current interpretation of the Japan-Indonesia peace treaty contravenes international law, followed by the provision of the right to diplomatic protection or compulsory obligation for the state at the constitutional level or through the Indonesian Foreign Relations Act (Law No. 37/1999) and other laws. This step must be followed by empowering nationals to invoke the stipulated rights, either through a constitutional complaint or through the administrative complaint mechanism. This can only be achieved possibly through the amendment of the constitution, amendment of the Indonesian Constitutional Court Act (Law No. 24/2003 as amended by Law No. 8/2011) or through legislative and judicial

interpretation to expand the constitutional court jurisdiction over the constitutional complaint. An administrative mechanism can also be enacted but only through the legislation of totally new regulations. Finally, it is recommended that Indonesian judicial organs follow progressive development on permitting judicial review of executive discretion pertaining to diplomatic protection. In this way, former Indonesian comfort women will be facilitated and empowered by sufficient tools to invoke their rights in front of the government. In addition, this may improve the Indonesian government's awareness of its obligation towards the victims.

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국문초록

한국과 인도네시아는 일제 점령 하 식민지를 거쳤다는 점에서 역사적인 동일성을 가진다. 두 국가의 여성들은 식민지 시기 일본의 인권침해 행위에 고통을 겪었으며, 이와 같은 피해자들은 “일본군 위안부”라고 불리고 있다. 그 이후 해당 문제는 일본과 피해자들이 속한 국적국들 사이에서 일본이 범죄에 대해 법적인 책임을 지는지 여부와 전후 평화조약 상의 조건으로 문제가 해결되었는지 여부에 관한 법적인 논쟁으로 비화되었다.

여러 학자들이 외교적 보호권을 이행하지 않는 국적국 정부의 부작위를 국민의 기본권 침해라고 분석하는 반면, 정부는 외교적 보호 의무를 지지 않는다는 의견도 상존하는 실정이다. 본고는 상기 문제의 법적인 문제를 살펴보고, 세 가지 분석을 시도하고자 한다. 우선 첫번째로 한국과 인도네시아의 위안부에 관련된 외교적 보호권이 인권 분야의 강행규범 위반에 대응하는 규범이 될 수 있는지 논의한다. 그 다음으로는 국제법에서 외교적 보호권을 의무로 변화시킬 수 있을지 분석한다. 마지막으로 한국과 인도네시아의 위안부 사례에서 상기 분석한 개념을 적용할 수 있는지 종합적인 평가를 수행하고 국제법적 함의를 도출하고자 한다.

현재 대세적인 견해로 비추어 볼 때, 외교적 보호권은 국가의 재량권이며 국제법적인 의무에 이르지 않는다는 것이다. 그러나 국가실행의 측면에서는 다음과 같은 세 가지 단계를 통해 새로운 방법을 모색할 수 있을 것이다. 첫째, 국내법을 통한 강제적 외교적 보호의 의무 제공, 두번째, 헌법 또는 행정법을 통한 외교적 보호를 받을 권리 발동, 그리고 세번째, 관할 법원에서 외교적 보호에 관한 재량에 대한 사법심사를 제안할 수 있을 것이다. 상기 세 가지 국가실행은 외교적 보호권과 국제 인권을 연결할 수 있는 역할을 수행한다. 이러한 국내 메커니즘은 집행부의 재량권을 통제하고 외교적 보호권의 국가중심적인 특성을 희석시킨다. 결과적으로 외교적 보호권은 침해된 인권을 보호하기 위해 효율적으로 활용될 수 있으며, 피해자들은 손해배상을 확보할 수 있게 될 것이다. 이것은 2006 년에

국제법위원회가 채택한 외교적보호권에 관한 조문 초안 제 19 조 및 전체 주석에 구체화된 국제법의 진보적인 실행으로 볼 수 있다.

국적국은 피해자의 권리 집행 시 정당한 절차를 보장하기 위해 위안부 사건의 해결을 위한 진보적인 국가실행을 이행해야 한다. 이와 같은 국가실행이 축적된다면 국제법에 따라 피해자가 적절한 손해배상을 받을 수 있는 더 큰 기회가 열릴 것이다. 나아가 진보적인 실천을 준수하는 것은 동시대 국제법의 목표, 즉 개인의 인권의 보장 및 발전에 도달하는 데 기여할 것이다.

주요어 : 위안부, 인권, 외교적 보호권, 국가책임

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